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Summary

Résumé de Décision

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, COMPLAINANT
UNION/RESPONDENT, AND ROGERS CABLE
T.V. LTD (HAMILTON), RESPONDENT
EMPLOYER, AND BRIAN O'TOOLE ET AL.,
INTERVENORS/APPLICANTS.

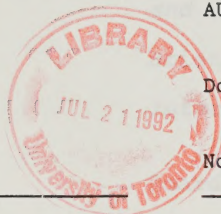
FRATERNITÉ INTERNATIONALE DES
OUVRIERS EN ÉLECTRICITÉ,
PLAIGNANTE/INTIMÉE, ROGERS CABLE
T.V. LTD. (HAMILTON), EMPLOYEUR
INTIMÉ, AINSI QUE BRIAN O'TOOLE ET
AUTRES, INTERVENANTS/REQUÉRANTS.

Board Files: 745-4063
565-409

Dossiers du Conseil: 745-4063
565-409

Decision No.: 942

No de Décision: 942



Canada
Labour
Relations
Board
Conseil
canadien des
relations du
travail

The Board found that Rogers Cable T.V. Ltd. (Hamilton) had been motivated by a desire to weaken, and ultimately to be rid of, the International Brotherhood of Electrical Workers as the bargaining agent for a unit of its employees when it refused to re-employ one previously injured employee who had been a union supporter, fired a union steward and disciplined a member of the bargaining committee.

Le Conseil juge que l'employeur, Rogers Cable T.V. Ltd (Hamilton), voulait affaiblir la Fraternité internationale des ouvriers en électricité à titre d'agent négociateur d'une unité de ses employés, et même l'éliminer, lorsque celui-ci a refusé de réembaucher un employé qui s'était blessé et qui était partisan syndical, a congédié un délégué syndical et a imposé des mesures disciplinaires à une employée membre du comité de négociation.

The Board also found that a petition for revocation of the union's certification (the second one filed within 12 months by the same individual) did not represent the real wishes of employees involved and, as such, was not a valid application for revocation which could lead the Board to decide to order a decertification vote.

En outre, le Conseil juge que la demande de révocation de l'accréditation syndicale (la deuxième déposée dans une période de 12 mois par la même personne) ne représente pas les véritables désirs des employés en cause et ne constitue donc pas une demande de révocation valable qui pourrait l'inciter à ordonner la tenue d'un scrutin en vue de révoquer l'accréditation syndicale.

The Board ordered the employer to find work for the employee who had been on workers' compensation, to reinstate the dismissed employee and compensate him for lost wages and to rescind all discipline concerning the bargaining committee member and compensate her for lost wages. The Board dismissed the decertification application.

Le Conseil ordonne à l'employeur de trouver du travail pour l'employé qui avait reçu des indemnités d'accidents du travail, de réintégrer dans ses fonctions l'employé congédié et de le dédommager pour toutes pertes subies, ainsi que d'annuler toutes les mesures disciplinaires imposées à l'employée membre du comité de négociation et de la dédommager pour toutes pertes subies. Le Conseil a rejeté la demande de révocation.

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Reasons for decision

International Brotherhood of
Electrical Workers,

complainant union/respondent,

and

Rogers Cable T.V. Ltd.
(Hamilton),

respondent employer,

and

Brian O'Toole et al.,

intervenors/applicants.

Board Files: 745-4063
 565-409

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Michael Eayrs.

Appearances

Larry Steinberg, accompanied by Keith Morrison, international representative, for the complainant union, International Brotherhood of Electrical Workers;

Howard A. Levitt, accompanied by Robert Shaw, customer service manager, Hamilton, for Rogers Cable T.V. Ltd; and

C. Ray Harris, and Brian O'Toole, for the intervenors.

These reasons for decision were written by Vice-Chairman Eberlee.

I

This case involved a complaint (file 745-4063) by the International Brotherhood of Electrical Workers (IBEW) against Rogers Cable T.V. Ltd. (Hamilton) (Rogers) in which it was alleged that the company had engaged in various

unfair labour practices against the union and union supporters, all with the ultimate aim of "undermining" the union by encouraging employees to seek decertification of the union. Brian O'Toole, an employee of Rogers who had filed an application for decertification of the union (file 565-409), sought and was given intervenor status in the matter.

The Board heard evidence and argument relating to the complaint and the decertification application on 12 days (December 17, 18 and 19, 1991, and February 3, 4, 5, 6, 7, March 3, 13, 31 and April 27, 1992) in Hamilton, Burlington and Toronto.

Until the fall of 1989, employees of Rogers in Hamilton were represented by the Metro Cable T.V. Association. When negotiations failed to produce a new collective agreement, the Association's supporters went on strike. This was an exhausting and divisive exercise for all concerned and although it did eventually end when collective agreement terms were finally agreed upon, the employees turned to a well-established and relatively well-resourced union, the IBEW, to represent them in the future. A substantial majority joined the IBEW, which was certified by the Board on November 3, 1989.

It is common knowledge that the negotiations between Rogers and the IBEW leading up to a first collective agreement (with a one-year term), which was ratified in June 1990, were strenuous to put it mildly. On October 5, 1990, Brian O'Toole filed with the Board an application for decertification of the union. Although the application came with a petition which purported to represent the will

of a majority of the employees in the unit, the Board, as is its usual policy in respect of such revocation applications - which are different from certification applications in that no real commitment of money or anything else is made - decided to test the wishes of the employees via a secret ballot. It turned out that a majority did not want to be rid of the union after all, much to the surprise especially of the employer and Mr. O'Toole, or so the Board was led to believe at the hearing.

A second collective agreement was concluded in April 1991, with a one-year term running from October 19, 1990.

As the collective agreement came towards its termination, the union, in early September 1991, elected a bargaining committee consisting of three employees and appointed a new steward. It also held a first negotiating meeting on September 23, 1991.

Meanwhile, undeterred by the earlier defeat, Mr. O'Toole went about obtaining signatures on a new petition for decertification, an activity which was well known to all of the players here - union and non-union supporters alike, and the employer. He eventually filed a revocation application with the Board on October 3, 1991.

On September 30, 1991, the newly appointed steward, Dan Achen, was fired. On the same day, one of the members of the bargaining committee, Tracie Wright, quarrelled with a fellow employee in the presence of her supervisor and walked out of the Rogers premises, whereupon the employer immediately accepted her "resignation" and refused to let

her return to her job. She grieved the matter, and on October 10, 1991, the company agreed that she could come back to work after a suspension of two weeks without pay.

The union alleged that these incidents and others cited in the complaint, which was filed with the Board on October 29, 1991, constituted violations by Rogers of sections 8(1), 94(1)(a), 94(3)(a)(i), 94(3)(e) and 96 of the Canada Labour Code (Part I - Industrial Relations). The sections read as follows:

"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.

...

94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ...

...

94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ...

...

(e) seek, by intimidation, threat of dismissal or any kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member,

officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part; ...

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

II

In retrospect, according to the union, Rogers had always sought to avoid having to deal with the IBEW or any other union. Counsel for the IBEW sought to illustrate this contention with evidence concerning events that had occurred from the time the union was certified and even before.

Counsel for Rogers argued that the Board should not listen to such evidence since it had to do with events that occurred more than 90 days before the complaint was filed. He pointed out that the Board under section 97(2) of the Code can only entertain a complaint that is filed within 90 days of the action or circumstances giving rise to the complaint. The union wished to bring to the Board's attention events that occurred long before, and well outside, the 90-day limitation period. No complaint had ever been made respecting those events themselves. The union had, in effect, accepted them at the time. Now the Board should not take them into account in determining the

timely complaints and certainly should not hear evidence concerning them.

Counsel for the IBEW argued, in effect, that while certain occurrences which took place more than 90 days before the complaint was filed could not in themselves be deemed to be complaints or remediable elements of timely complaints, evidence concerning them could nevertheless be accepted by the Board as being relevant to the picture he was attempting to draw of the employer's overall and long-term conduct.

When this argument arose at the outset of the hearing, it was largely hypothetical, there being no evidence then before the Board, simply the announcement by the union of the intention to adduce such evidence. The Board made the general pronouncement that obviously it would not entertain a "complaint" that was more than 90 days old - that is, that went back more than 90 days before the filing date of this complaint, which was October 29, 1991 - but that it had no intention of preventing any party from adducing evidence that might be deemed by it and the Board to be relevant to countering, contradicting, supporting or explaining anything relating to the complaint, whether the evidence had to do with occurrences much more than 90 days before the filing of the complaint or subsequent to the filing of the complaint.

On reflection, we conclude that any panel of the Board must of necessity adopt this posture with respect to evidence surrounding the "action or circumstances" giving rise to a complaint. This is because, for example, the action or circumstances giving rise to a complaint may be a dismissal

which may not be made the subject of a complaint until the 89th day after it occurs. The employer's explanation and rationale for having fired the employee for grounds other than those forbidden by section 94 of the Code may relate to incidents that occurred before the actual day of dismissal and thus more than 90 days before the complaint was filed. Similarly, the union's endeavour to paint a picture of employer anti-union animus may be based on evidence of incidents that also occurred somewhat more than 90 days before the complaint was filed. To suggest that the Board should not hear evidence in a case like that from either party, if it had to do with happenings more than 90 days before the complaint was filed, evidence that might tend to provide proof favouring the position of one or other of the parties, is ridiculous, to put it mildly. While section 97(2) specifies that certain complaints can only be 90 days "old" at the most, nothing in the Code regulates the age of the evidence adduced to support or contradict a complaint. The rule concerning evidence must be relevance, not age.

Fortunately, for the employer's counsel the Board did not adopt the rule he had proposed. Thus, and quite properly so, nobody interrupted him when he brought forward three- and four-year-old evidence of employee behaviour to counter union allegations.

III

Larry Pickles was division manager for Rogers in Hamilton from April 1989 until January 1990. This was during the period of the negotiations and the strike by the former employee association and of the organization and

certification of the IBEW as the new bargaining agent. Soon after becoming manager in April 1989, Mr. Pickles wrote the following note to a supervisor who was responsible for hiring employees:

"With the union situation here we should carefully research the background of new hires to determine if they have had a union background or not.

We cant [sic] discriminate on this basis but should consider candidates who have not previously worked in a union environment, (a well drafted letter)?"

Mr. Pickles testified he did not think at the time that there was anything wrong with the note. He had received no instruction on how to deal with unions when he wrote it. He told the Board he had been later advised by a superior that the note was improper, although he could not recall who the superior was. Nor did he know whether it was Rogers policy to discourage people from joining unions. He testified that he could not recall countermanding the note before his departure from Rogers in January 1990, and no evidence was presented to the effect that this "policy" had been rescinded.

The note came into the union's hands and in June 1990, international representative Keith Morrison brought it to the attention of the company via Joan Bolland, then vice-president, human resources, in a letter advising of formal acceptance by the bargaining unit of the first collective agreement negotiated between Rogers and the IBEW. The company's reply came from its counsel, Mr. Levitt (according to copies of correspondence attached to the complaint, the validity of which was not challenged at the

hearing), and he assured Mr. Morrison that, "It is Rogers policy to be evenhanded respecting the union and not to discriminate, in any respect, directly, indirectly, intentionally, unintentionally or systemically between union and non union applicants or employees." He also undertook to ensure that those involved in hiring employees in Hamilton "are reminded of our evenhanded approach."

What are we to make of the Pickles note? While the company disclaimed any responsibility for it and sought to distance itself from the discriminatory policy set out in the note, the fact remains that the senior management of the Hamilton operation between at least April 1989 and January 1990, when employees were attempting to establish the IBEW as their bargaining agent, adopted and probably implemented a policy looking to bar prospective union supporters from employment. In spite of the assurances to Mr. Morrison in the correspondence from the employer's counsel, there is no evidence before the Board that anything concrete was done by the company to ensure that this kind of state of mind did not continue to animate the hiring process in Hamilton over the next 18 months.

Mr. Morrison testified that he did not bring the Pickles note to the company's attention until after the first set of negotiations had been successfully concluded, or make it the subject of a complaint to the CLRB, because the union, when it won certification, enjoyed very substantial support; he did not see the point then of raising the matter and complicating the relationship. He did bring it up later with the company once the relationship had apparently solidified via a collective agreement, in order

to ensure that senior people in the company were aware. His explanation makes sense.

IV

Another episode dating back to September and October 1989 following the strike by supporters of the previous bargaining agent, and during the time when employees were transferring their allegiance to the IBEW, was brought forward by the union to illustrate what it alleged was Rogers' anti-union attitude.

Jim Kazienko, a long-time employee of Rogers Hamilton, was a shop steward for the Metro Association in the fall of 1989. He testified that a construction technician, Jim Kelly, normally employed in Kitchener but assigned to Hamilton in September and October 1989 to help clean up a backlog of maintenance work, had confided to him that he (Kelly) had been sent by Rogers management to Hamilton to try to organize an in-house association as an alternative to any formal bargaining agency. Mr. Kazienko said he had as many as six conversations with Mr. Kelly; the gist of these conversations was that if the Hamilton employees went with an in-house association similar to the one in Kitchener, they would be among the best-paid Rogers employees in Ontario. He testified that Mr. Kelly said Rogers did not want the IBEW.

International representative Morrison and chief steward Jim Hrach confirmed in their testimony that Mr. Kazienko had told them the Kelly story at the time. Mr. Morrison said he did nothing about it then because the in-coming IBEW was supported by some 85% of the employees, and Mr. Kelly had

not been able to influence them.

The employer brought Mr. Kelly to testify. He denied playing the role ascribed to him by Mr. Kazienko, although he did admit he had told Mr. Kazienko that the Kitchener in-house association worked well.

Joan Bolland, then the vice-president of human resources, told the Board she had no knowledge of Mr. Kelly being brought in for anti-IBEW purposes.

The employer sought to destroy Mr. Kazienko's credibility and to have the Board write him off as an untruthful witness. John Carey, engineering supervisor in Hamilton, testified that he found papers on his desk one day in January 1990 which were from personnel files that were normally locked up in his desk. These papers were photocopies of Mr. Kazienko's personal files. When he asked Mr. Kazienko if he knew how the papers had come to be on the desk, Mr. Kazienko admitted that he had removed them from a desk drawer and had copied them. Nobody saw Mr. Kazienko in the act of doing this; it was only because he admitted having done so that the "crime" was solved. Mr. Kazienko was given a five-day suspension.

The Board's conclusion is that Mr. Kazienko's credibility is enhanced, rather than thrown into question, by this episode. He was honest when confronted about an improper act; had he been dishonest and had he denied any knowledge of it he would only have been a suspect and the company would not have been able to use this tale to cast doubt upon his testimony concerning Mr. Kelly. The latter did testify to having discussed the benefits of the Kitchener

in-house association with Mr. Kazienko. Everything the Board heard during the course of the hearing leads it to conclude that, on balance, Mr. Kazienko was telling the truth about Mr. Kelly's encounters with him and about what Mr. Kelly said concerning Rogers use of him vis-à-vis IBEW organizing endeavours.

V

Mr. O'Toole filed his first application for decertification of the union early in October 1990. Many of the persons who signed it obviously voted to keep the union when a secret ballot was held in January 1991, for a majority supported retention of the union. Exactly when he began collecting signatures for a second attempt to revoke the union's certification is not clear but it is probable that his campaign began in the spring of 1991. Shortly before the October 1990 decertification application, Dennis Lacasse sought a promotion to a job in the service department. He testified that he had a discussion with supervisor Terry Furlong about the job, although it was not in Mr. Furlong's area of responsibility; the decision as to the successful applicant rested with another supervisor, Bernie Morris. Mr. Furlong asked him if he had spoken to Mr. O'Toole. Mr. Furlong simply asked him, "Did you speak to Brian?" but did not say why he was asking. Mr. Lacasse testified that he thought there was a connection between the union and getting the job; he told the Board he thought then it was "possible" that if he signed "Brian's paper" there would be a better chance for him to get the job. He testified that he told chief steward Jim Hrach that Mr. Furlong wanted him to talk to Mr. O'Toole; he also told Mr. Hrach what he understood Mr. Furlong to be trying to

tell him. "It could be correct," he told the Board, that he had passed on to Mr. Hrach and Mr. Morrison the information that Mr. Furlong had said if he wanted the promotion he should see Mr. O'Toole. (Messrs. Hrach and Morrison testified that he told them this story no later than January 31, 1991, soon after the vote.)

Mr. Lacasse was a very reluctant witness. He had some difficulty remembering events and conversations with precision. At first, during his testimony, he associated the conversation with Mr. Furlong with the period before the October 1990 revocation application. Later, he thought it might have been in April 1991, which would have placed it around the time Mr. O'Toole was gearing up to do battle with the union for a second time. On the other hand, Mr. Lacasse did insist that Mr. Furlong had asked him if he had spoken to Mr. O'Toole, whatever the precise date of the question. (The totality of the evidence suggests that the period before October 1990 was probably the time he meant.) Mr. Lacasse left Rogers in September 1991 and took employment elsewhere. He can be viewed as one of the few witnesses who came before the Board without an anti-IBEW or pro-IBEW axe to grind. The Board accepts the generality of his evidence concerning supervisor Furlong and concludes that it does show that Mr. Furlong, a representative of Rogers management, assisted the ambitions of Mr. O'Toole to get rid of the union.

A similar example of a person supporting the first petition because she thought this was the price to pay for getting a new job, and was what the employer wanted, came in the testimony of Cathy Lemaich. Although a good part of her testimony appeared somewhat irrelevant, it turned out that

her evidence contained elements which did not help the employer's case. In October 1990, she wanted a job as a dispatcher and she believed from the atmosphere at work that she had a better chance of getting it if she signed the petition. She did. She also got the job.

There is no proof that the one led to the other. But an employee thought it did. Thus her signature on the petition did not represent her real wish; it was her perception of what the company wished her to do.

VI

Dan Achen was fired on September 30, 1991, about three weeks after he became a union shop steward. He had been with Rogers for eight and a half years. The company sought to convince the Board that Mr. Achen's dismissal resulted from a long history of horrific performance on the job.

According to Robert Shaw, the Hamilton customer service manager, Mr. Achen, was always a poor employee - with low productivity, too much absenteeism and tardiness, too argumentative, uncooperative and so on. The company could not document this to any extent because in October 1990, when Mr. Achen was transferred from supervisor Morris to supervisor Furlong, the latter, with the concurrence of Mr. Shaw, allowed Mr. Achen to go through his personal file and to destroy memos and letters relating to discipline. It was only because copies of one or two personnel documents that had been destroyed survived elsewhere in company records that the employer was able to resurrect any adverse paperwork on Mr. Achen.

If Mr. Achen really was as dreadful an employee as he was described by witnesses for the company it is nothing short of miraculous that he survived in employment until October 1990. His performance appraisal issued in that month gave him a good rating, as did the next appraisal which came out in June 1991. Thus, the company's claim that he had a bad record and that this justified his dismissal can only be given credence - if at all - from June to September 1991. We shall return to this later.

Mr. Achen testified that in 1990 and early 1991, he and Mr. Furlong were on good terms. During a conversation between them in the fall of 1990, Mr. Furlong commented that Hamilton was "roped off," that Rogers had isolated it because it was the only unionized unit in the Rogers eastern system and that Rogers would not improve their pay and benefits until they got rid of the union. Mr. Achen told the Board he could see Mr. Furlong's point and agreed with him. Mr. Furlong suggested he should steer people toward Brian O'Toole - should "talk to them on the side" about signing in favour of decertification. All this was denied by Mr. Furlong.

Mr. Achen said he signed the revocation petition prior to the January 1991 vote; he later changed sides and began to support the union in the spring of 1991 when he learned that negotiations were going poorly and that the Hamilton customer service manager had made uncomplimentary remarks about the employees generally at a negotiating meeting. He felt the company wanted the union out and "just didn't give a damn" about the employees. At a spring union meeting, he spoke and expressed annoyance at what he described as favouritism being shown by the company toward some people

who opposed the union and at "how union supporters were being leaned on."

Soon thereafter, Mr. Shaw took him to task for allegedly not paying his bills and for purportedly having caused embarrassment to a senior company official with a similar sounding name, who had received calls from a credit or collection agency demanding payment of certain "Dan Achen" bills. Mr. Achen took this as some kind of retribution by Mr. Shaw for his expressions of opinion regarding the union because he actually had no unpaid bill problem. Mr. Shaw admitted that the conversation took place, and thought it had occurred after Mr. Achen became a union steward, but denied he had any ulterior motive.

Mr. Furlong testified that Mr. Achen had had a "big" personal file with perhaps as many as 15 disciplinary notations. It was these documents that he allowed Mr. Achen to destroy in the fall of 1990; then in the summer of 1991 he began to try to recreate the file. Mr. O'Toole was recruiting support for his second decertification application during that period. Mr. Achen refused to sign the petition.

Mr. Achen began to get into trouble with the employer in July 1991. On July 5 and July 8, Mr. Achen was a few minutes late for work. He received a warning letter from Mr. Furlong on July 8 threatening further severe disciplinary action up to and including discharge if these infractions were repeated. On August 6, he called in at 8:10 a.m. (he was due at 8:00 a.m.) to say his car would not start. He asked for and was given half a day's holiday to have it fixed. This was not considered an infraction at

the time; he received no letter or discipline, nor was there any verbal disapproval from management. On August 15, he called in at 8:00 a.m. from a nearby pay phone to say he had run out of gas and to ask if somebody would pick him up. This was done and he arrived at work only a few minutes late. This incident was not treated as an infraction at the time and again he was not subjected to any verbal or written disapproval.

Early in September, Mr. Achen was elected a union steward. On the morning of September 11, he was sick when his alarm clock awakened him well before 7:00 a.m. He did not call the company then to say he was sick and could not work. Instead, he fell asleep again, intending to call the office before 8:00 a.m., but he was still asleep at 8:25 when Mr. Furlong called to find out where he was. After explaining that he was sick, he remained at home. The company (Mr. Furlong) found him guilty of a "continued disregard to follow company rules and regulations" [sic], for failing to call in sick before 8:00 a.m. and for forcing the supervisor to call him at 8:25 a.m. to see what was going on. The Board was interested that although the August 6 and August 15 incidents had not been considered worthy of discipline or even of note at the time, they, along with the July 8 written warning for lateness, figured in the bill of particulars which now brought down a five-day suspension without pay upon the head of Mr. Achen. The Board, of course, has no mandate or jurisdiction to consider the appropriateness of a penalty such as this - and the suspension has been grieved - but it is our opinion, for what it is worth - that the penalty was overly harsh in that the basis for it was rather flimsy. We think, on balance, that it went well beyond simply being a

punishment to fit a specific crime and related as well to the fact that Mr. Achen was a union supporter. It was a signal to union supporters generally.

The final scene on this drama which ended with Mr. Achen's dismissal on September 30, presents a rather odd picture: Mr. Achen arrived at work on time; he did various things around the office until leaving for his first assignment a minute or so before 8:30 a.m. Supervisor Bernie Morris testified that at 8:30 a.m., Mr. Furlong came to him and told him he had been trying to get Mr. Achen on his two-way radio, but there was no answer. The computer terminal showed that Mr. Achen had activated the signal that showed he was on his way to his assignment. Nevertheless - and this could only have been within five minutes of Mr. Achen's departure from the office - Mr. Morris suspected Mr. Achen was somewhere other than en route to his first job. (We were never told why Mr. Morris suspected this.) So the two of them took off quickly to try to find him.

Thus, with Mr. Achen barely out the door, this pair of supervisors decided they were going to catch him doing something wrong. And, on this occasion, luck was with them.

While they were en route to the location where Mr. Achen was to be, the computer in their vehicle (which was connected to the vehicles of Mr. Achen and other employees) showed that at 8:45 a.m. he had signalled he was on site. Mr. Morris testified that they arrived at the location at 8:50 a.m. but there was no sign of Mr. Achen. Nor was there any sign of him at 9:05 a.m. when they drove by

again. But he was there when they cruised past again at 9:10; he was sitting in his truck, reading a newspaper.

According to Mr. Morris, he had failed to log in a stop for coffee and a paper, had failed to log in his whereabouts at all times, had lied about where he actually was, said he had stopped to use the bathroom at the other Rogers office, which was close to his work site, when he had apparently used the bathroom at the place where he had bought his coffee, failed to log the bathroom stop into his computer and, generally, had falsified his whereabouts.

Mr. Achen testified that he heard no calls from Mr. Furlong on the two-way radio while he was driving to the site before 8:45 a.m.; at that time he signalled via the computer that he was on site just before he arrived there, which was not an unusual practice, and then did not cancel the signal when he decided to stop to go to the bathroom at McDonald's and to buy a coffee. It was just after 9:05 a.m. when he actually reached the job. He said he was sitting in his truck looking at cable system plans before proceeding to do the assigned work when Messrs. Morris and Furlong appeared. He was not reading the paper.

Why he originally told Messrs. Morris and Furlong that he went to the bathroom at Rogers' other office when in fact he did so at McDonald's was the subject of some examination and cross-examination at the hearing. He testified that he had told them he had gone to the Rogers facility because it sounded better than saying he had stopped at McDonald's. But it was a "stupid thing to do," he told the Board.

What is equally mysterious (except for the fact that on

this point they could actually prove he had lied) is why Messrs. Morris and Furlong made such a big thing out of where Mr. Achen went to the bathroom. In the final analysis, while he was foolish to lie about something like this, it was not a lie that made very much difference to anything - except that it gave Messrs. Morris and Furlong a further excuse to get rid of him, which they did later that morning.

The employer raised questions about Mr. Achen's credibility, as well as his record as an employee, via two fellow workers, both of whom, as it turned out, were cronies of supervisor Morris. Paul Milawski told a story about Mr. Achen telling him not to work so hard because Mr. Achen looked bad in comparison. He also testified that Mr. Achen had tried, but had failed, to break into supervisor Morris' desk. He told the Board that he reported both of these things to Mr. Morris some time after they occurred, but he asked Mr. Morris not to tell anybody. Vince Parry also testified that Mr. Achen had urged him to be less productive. Mr. Parry claimed he passed this on to Mr. Morris, as well.

Mr. Achen was never confronted with these claims when management heard of them and never had an opportunity to reply or to defend himself until this hearing occurred. Mr. Morris testified that these stories further influenced him in his decision to join with Mr. Furlong in urging that Mr. Achen be dismissed.

Having observed very carefully the demeanour of Messrs. Morris and Furlong in the witness stand, as well as that of Mr. Achen - and, of course, that of all the

witnesses who passed in front of us during the numerous hearing days - the Board believes Mr. Achen's account of what Mr. Furlong said to him about the union and Rogers' wishes about the demise of the union, as reported on page 15. The Board also considers, on the basis of all of the evidence, that the dismissal of Mr. Achen was not just flimsily based, but also had as one of its causes the fact that he was a union supporter and a union steward. It, too, served as a signal to other employees in the bargaining unit that it was not particularly healthy to support the union.

VII

September 30, 1991 was a busy day at Rogers as far as the departure of known union supporters was concerned, as the following will demonstrate.

Tracie Wright, a technical service representative, had been elected at the early September union meeting to be a member of the union's bargaining committee. She had been experiencing some personal problems and had recently moved into a small apartment in a house owned by her supervisor, Shelley Haddad, who was a friend at the time.

Ms. Wright told the Board that she needed to take a few hours off on the afternoon of September 30 so that she could let a telephone company installer into her apartment to hook up a telephone for her. She asked a co-worker, Iman Said, to stand in for her. The latter objected, apparently because she felt she had been put upon by similar requests in the past; the two got into an argument.

Supervisor Haddad involved herself in a discussion of the matter with the two women. Ms. Wright became emotional, walked out and went home.

Both supervisor Haddad and Ms. Said told the Board that Ms. Wright said, before she walked out: "I quit; I quit; I quit." To the Board, it seems strange that Ms. Haddad, a friend of Ms. Wright who had rented an apartment to her and who knew that Ms. Wright was having personal, emotional problems at the time, would have taken this episode quite so seriously.

Ms. Wright testified that after she reached her home, she was getting ready to return to the office to apologize to Ms. Haddad, when chief steward Jim Hrach and Mr. Achen (who had just been fired a few hours before) arrived with a copy of a letter from Ms. Haddad to Ms. Wright, which said:

"This is to confirm your resignation with Rogers Cable T.V. Limited in Hamilton as a Technical Service Representative, effective September 30, 1991."

This was only two hours after she had left. The "termination" was grieved by Ms. Wright and was replaced by a two-week suspension without pay - a not inconsiderable penalty itself.

Hamilton customer service manager Shaw described Ms. Wright as a "troublesome" employee; no doubt, as a continuing union supporter, she was such to the company. Under cross-examination, he was forced to concede, however, that until the September 30 incident there was nothing on the record to back up this assessment. Her appraisals showed she was

a fully satisfactory employee; most of them had been done by Ms. Haddad.

One incident that illustrated management's attitude and, in the Board's opinion, management's ongoing anti-union interference was related to the Board by Ms. Wright. On September 18, 1991, retail stores supervisor, Marissa Leuzzi, a member of the management team, made a point of noting that Ms. Wright's name was on a bulletin board as one of the recently elected union negotiators and expressed surprise over this. Ms. Leuzzi testified that she was surprised, because she had thought Ms. Wright was anti-union.

Mr. Shaw testified that the company decided to substitute a less onerous punishment - a suspension in place of a termination of Ms. Wright - because she was a member of the union negotiating committee. That may be. But the evidence in the case, taken altogether, convinces the Board that the punishment of Ms. Wright for the September 30 incident, in whatever form it ultimately appeared, was motivated in part by dissatisfaction with her union involvement and was meant, as well, to convey to the employees that it was not in their best interests to support the union.

VIII

The case of Gary Francis is more difficult to assess. Mr. Francis began working full-time for Rogers in July 1987. By April 1989, he was a construction technician. He had hurt his back many years before, while on the job for a different employer; his injury was covered by workers'

compensation. For many years, he had no problems; then he reinjured himself and in 1990 had to have an operation on his back. Trouble recurred and he was operated on again in May 1991. In September 1991, he sought to have Rogers take him back in duties that would not strain his back. Two other employees who had been injured and had been on workers' compensation were working for Rogers at that time in jobs that did not strain their physical capabilities.

The company refused to take him back to work. According to Mr. Shaw, this was because of his physical limitations as specified by his physician. There was no work available for him. After listening to the evidence pro and con Mr. Francis' potential capacity to do productive work for the company, even in a somewhat limited way, the Board concludes that the company went rather far out of its way to keep him from returning to work.

Mr. Francis and the union suspected that the company's determination not to take him back had something to do with the fact that he had been a union supporter and had served on the union's bargaining committee for the first collective agreement.

The decision not to take Mr. Francis back predated the filing of the complaint.

By the time the hearing began on December 17, 1991, the company had managed to acquire a further rationale for not wanting him. This had to do with new allegations made against him by supervisor Haddad. Her story was that in the past Mr. Francis had sexually harassed her and she was afraid to work near him, should a lighter job be found for

him in her area of responsibility. In testimony at the December part of the hearing, Ms. Haddad said that on several occasions Mr. Francis had expressed appreciation of her appearance in ways which were unwanted by her and that his remarks constituted sexual harassment. She had never reported these to anybody else until she had told Mr. Shaw after the complaint was filed and the union raised Mr. Francis' case.

Mr. Francis testified that he had complimented Ms. Haddad on her appearance in the past and she had never objected. She had simply thanked him.

Whatever the truth of Ms. Haddad's allegations, and we do not question her own feelings toward what she believed Mr. Francis may have done, these allegations were not known to the employer at the time it refused to take Mr. Francis back. The employer cannot now use allegations about which it was then unaware to explain why it took certain action toward Mr. Francis at that time. We shall have more to say about Mr. Francis later.

IX

Ms. Haddad figured prominently in the employer's answers to many of the union's charges. One such, the relevance of which is not entirely certain to the Board, at least in terms of showing alleged anti-union animus, does illustrate the way in which the employer fought the complaint and says something about the credibility of what was put forward in that fight.

Michelle Wiatrowski was a long-time union supporter who was

elected to the union negotiating committee in early September 1991. She had been stockkeeper since August 1987.

In February 1991, Mr. Shaw, the customer service manager called a female person who was working in the stockroom, "fat, stupid and smelling." Dennis Lacasse, who witnessed the incident, wrote in a note, which he gave to chief steward Jim Hrach and which was included in the "particulars" attached to the complaint, that Mr. Shaw had been referring to Michelle Wiatrowski. Another employee, Norm Meadowcraft, also witnessed the incident and, in reference to Ms. Wiatrowski, said in a note which he wrote for Mr. Hrach: "Bob Shaw made several comments about the stock keeper weight and how it affected her job performance." [sic]

During his testimony, Mr. Lacasse said that Mr. Shaw did not actually refer to Ms. Wiatrowski by name. He assumed Mr. Shaw was referring to her because of her support for the union. Mr. Meadowcraft testified that he heard the whole discussion. He assumed that Mr. Shaw was directing his comments at Ms. Wiatrowski. Now he knows that Mr. Shaw was really referring to Ms. Haddad, the supervisor. How did he get to know this? Because, after Christmas (after the start of this hearing), his supervisor, Mr. Furlong told him Mr. Shaw was angry about Ms. Haddad, not Ms. Wiatrowski. Mr. Furlong "just straightened me out as to what happened and why it happened." He had signed the note originally because chief steward Hrach asked him to, in order to "get" Bob Shaw. Now, Mr. Meadowcraft regretted having accused Mr. Shaw in the note. He was not present because of a subpoena; he had volunteered to testify.

There are two conclusions to be drawn from the foregoing: one is that the atmosphere of the work place was such that an employee naturally assumed that when a person was criticized by management it was because that person was a union supporter. The other is that a member of management, Mr. Furlong, apparently had no compunction about influencing a particular witness in respect of his potential testimony.

We have mentioned earlier that Mr. Lacasse is no longer employed by Rogers and that he did not appear to be a witness with any particular axe to grind. His evidence was that he assumed manager Shaw was criticizing Ms. Wiatrowski and he made that assumption because she was a known union supporter. This tells something about how one employee, and probably many others, saw the atmosphere of the work place - that union supporters were not popular with management.

With respect to Mr. Meadowcraft's part in this episode, particularly when the name of the ubiquitous supervisor Furlong is involved, the unsettling question inevitably arises as to how voluntary was his reaction to his boss' effort to straighten him out before he testified.

X

It is clear to the Board that a desire to weaken, and ultimately to be rid of, the IBEW was a motivating factor in the company's treatment of union supporters. There was an element of anti-union animus in the discipline leading up to, and in the eventual dismissal of Mr. Achen; in the effort to make the angry departure of Ms. Wright a

resignation (and then only an act of insubordination deserving of the punishment a two-weeks' suspension); and in the refusal to find work for Mr. Francis.

The company also conveyed clearly to employees through these and other means that it wanted the union to be decertified. It injected itself so much and so far into Mr. O'Toole's campaign, whether or not Mr. O'Toole was fully aware, or even desirous, of such aid and comfort, that Mr. O'Toole's claim to represent a majority of the employees in the bargaining unit cannot be given any credence; the petition should not be viewed as a valid application for revocation under section 38 of the Code. In the Board's opinion, based on the evidence in this case, many of the signatures on the petition are there because employees believe the employer wishes them to be there, not because the employees themselves genuinely so wish. The basic requirement of a revocation application which would lead the Board to decide to order a vote does not exist at this time.

The Board finds that the employer, Rogers Cable T.V. Limited has violated sections 94(3)(a)(i), 94(3)(e) and 96 of the Code. Under the remedial power given to it by section 99, the Board orders Rogers Cable T.V. Limited to cease and desist from violating the Code and to do the following:

1. Reinstatement Mr. Achen forthwith in the employment from which he was discharged on September 30, 1991;
2. Pay to Mr. Achen within 10 days of the date of this decision compensation equivalent to the remuneration

he would have received between the date of his discharge and the date of his reinstatement in employment;

3. Rescind the two-weeks' suspension given to Ms. Wright, as recorded in a memorandum dated October 10, 1991, compensate her within 10 days of the date of this decision in an amount equal to the remuneration she lost as a result of the suspension and remove from her file and destroy all copies of the suspension notification and the September 10, 1991 confirmation of her alleged resignation;
4. Reinstatement Mr. Francis in a position he is capable of doing, having regard to the physical limitations which may currently apply to his situation; and
5. Make and provide forthwith to all employees within the bargaining unit a copy of these reasons for decision.

For the reason already cited, the Board dismisses Mr. O'Toole's application for revocation of the order certifying the IBEW as the bargaining agent for certain employees of Rogers Cable T.V. Limited, Hamilton (file 565-409).

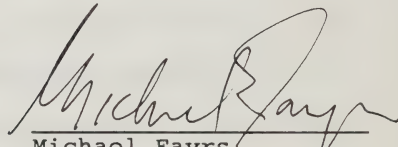
The Board appoints Peter Suchanek, Ontario regional director and registrar, or an officer named by him, to assist the parties to implement the foregoing orders. The Board will remain seized of these matters in order to deal with any problem that may arise or to decide any difference relating to the implementation of these orders and to issue a formal order should such be required.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 6th day of July 1992.

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Information

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RÉSUMÉ

LE SYNDICAT CANADIEN DE LA
FONCTION PUBLIQUE (DIVISION DU
TRANSPORT AÉRIEN, SECTION LOCALE
4026), AU NOM DE S. CASTRO-MARTIN
ET AUTRES, PLAIGNANT, ET
NATIONAIR CANADA (NOLISAIR
INTERNATIONAL INC.), INTIMÉ.

Dossiers du Conseil: 745-3830
950-186
950-189

No de Décision: 943

L'employeur a congédié dix agents
de bord et en a suspendu un autre
à la suite de leur refus
d'effectuer le vol reliant Fort
Lauderdale à Mirabel le 1^{er}
décembre 1990.

Le syndicat et les agents de bord
ont présenté au Conseil trois
demandes alléguant violation des
alinéas 50a) et b) et 94(3)a) et
b), de l'article 96 du Code
Partie I, ainsi que du paragraphe
133(1) du Code Partie II. Le
Conseil était également saisi
d'un renvoi en vertu du
paragraphe 129(5) du Code Partie
II.

Le Conseil a décidé d'appliquer
le paragraphe 98(3) et de ne pas
instruire les plaintes fondées
sur les articles 94 et 96, des
griefs ayant été présentés pour
contester ces mesures
disciplinaires.

Le Conseil a confirmé la décision
de l'agent de sécurité qui avait
conclu à l'inexistence d'un
danger au sens du Code au moment
où le refus de travailler du 1^{er}
décembre 1990 a été exercé.

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be used for legal purposes.

SUMMARY

CANADIAN UNION OF PUBLIC
EMPLOYEES (AIRLINE DIVISION,
LOCAL 4026), ON BEHALF OF S.
CASTRO-MARTIN ET AL.,
COMPLAINANTS, AND NATIONAIR
CANADA (NOLISAIR INTERNATIONAL
INC.), RESPONDENT.

Board Files: 745-3830
950-186
950-189

Decision no.: 943

The employer dismissed ten flight
attendants and suspended another
following their refusal to work
the Fort Lauderdale-Mirabel
flight on December 1, 1990.

The union and the flight
attendants filed three
applications with the Board
alleging violations of sections
50(a) and (b), 94(3)(a) and (b)
and 96 of Part I of the Code and
section 133(1) of Part II of the
Code. The Board was also seized
with a reference under paragraph
129(5) of Part II of the Code.

The Board decided to apply
section 98(3) and not hear the
complaints based on sections 94
and 96, since grievances had been
presented against these
disciplinary measures.

The Board confirmed the decision
of the safety officer who had
concluded that no danger existed
within the meaning of the Code
when the complainants refused to
work on December 1, 1990.

Le Conseil a rejeté la demande alléguant violation de l'alinéa 147a), puisqu'aucune plainte n'a été présentée au Conseil dans le délai de 90 jours établi au paragraphe 133(2). Il a refusé de proroger ce délai. Il a également refusé d'accepter une modification à la demande de renvoi présentée en vertu du paragraphe 129(5) afin d'y ajouter les éléments constitutifs d'une plainte selon le paragraphe 133(1), puisqu'une telle modification aurait eu pour effet, dans le cas présent, de changer la nature de la demande originale.

Finalement, compte tenu de l'état actuel des négociations, le Conseil a décidé de suspendre le délibéré concernant les allégations de négociation de mauvaise foi.

The Board dismissed the application alleging violation of section 147(a) because no complaint was made to the Board within the ninety-day time limit provided for in section 133(2). It refused to extend this time limit. It also refused to accept an amendment to the application for referral under section 129(5), in order to add the information required for the purposes of a complaint under section 133(1), because this amendment would have had the effect, in the instant case, of altering the nature of the original application.

Finally, in view of the current status of the negotiations, the Board decided to suspend consideration of the allegations of bad faith bargaining.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Union of Public
Employees (Airline Division,
Local 4026), on behalf of
Sandra Castro-Martin et al.,

complainants,

and

Nationair Canada (Nolisair
International Inc.),

respondent.

Board Files: 745-3830
950-186
950-189

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Ms. Beverley Burns, accompanied by Ms. Michelle Pallett,
Head of the Health and Safety Committee, for the union; and
Mr. Guy Tremblay, accompanied by Mr. Jim McLarnon, Director
of Industrial Relations, for the employer.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair.

I

The Proceedings

The Board received two complaints of unfair labour practice
and a reference seeking the review of a decision of a Labour
Canada safety officer.

In the first complaint, received by the Board on January 10, 1991, it is alleged that the employer, Nationair Canada (Nolisair International Inc.), contravened sections 94(3)(a), 94(3)(b), 96, 50(a) and 50(b) of Part I of the Code. In the second complaint, received on March 28, 1991, the Board is asked to declare that the employer contravened section 147(a) of Part II of the Code when it dismissed and suspended flight attendants who had refused to work on December 1, 1990. Lastly, the union asked the Board to review the decision of Marie Zubryckyj, Labour Canada safety officer, rendered on February 11, 1990, according to which the refusal to work of December 1, 1990 was not based on the existence of a danger within the meaning of the Code. The reference was received by the Board on March 14, 1991.

The Canadian Union of Public Employees (Airline Division, Local 4026) (CUPE) has been certified since December 16, 1986 to represent the following group:

"All persons employed by Nationair (Nolisair International Inc.) as cabin personnel, excluding senior manager in-flight service, training manager, line supervisor, supervisor duty free, and administration manager."

The collective agreement expired on December 31, 1990, and the parties are currently negotiating to renew it.

The Board heard the parties at a public hearing at Montréal, on May 2, 3, 28, 29 and 30, June 6 and 7, September 19 and 20, October 23, 24 and 25, 1991 and February 5, 7 and 27, 1992. At the start of the hearings, the employer filed preliminary submissions on certain issues raised by the union's applications.

In light of the allegations that sections 94(3)(a), 94(3)(b) and 96 were contravened, the Board asked the employer to present its evidence first.

A. File 745-3830

Complaint of unfair labour practice dated January 10, 1991

This complaint is based on three elements. First, the union alleged that on or about December 12, 1990, the employer dismissed 10 flight attendants and suspended another for a period of two months, following those employees' refusal to make flight 681 from Fort Lauderdale to Montréal on December 1, 1990.

On December 28, 1990, the employer filed a grievance against each of those employees, claiming damages of \$121,000 from them jointly and severally following the events of December 1.

For their part, the flight attendants contested their dismissal through individual grievances filed between December 14 and 21, 1990. CUPE argued that the actions taken by the employer following the events of December 1 violated sections 94(3)(a), 94(3)(b) and 96 of the Code. The employer replied that it imposed disciplinary actions because the employees breached the provisions of the collective agreement; it further stated that those actions were not the result of anti-union animus and did not constitute retaliatory measures relating to the employees' union activities or to the collective bargaining then in progress.

In brief, the employer contended it was merely exercising its management rights. It asked the Board to refuse to hear

and determine that part of the complaint, in application of section 98(3) of the Code. The actions have already been grieved, and the powers granted to the arbitrator under the collective agreement are sufficiently broad to ensure settlement of the dispute, including reinstatement if the arbitrator finds that the grievances are well founded. On the latter point, the union argued that only the Board can grant the remedy sought, since at issue here is the exercise of fundamental rights provided in the Code.

Second, the union alleged that since October 22, 1990, when the notice to bargain was served on the employer with a view to renewing the collective agreement, the employer breached its duty to bargain in good faith, resorting to dismissals in order to intimidate the flight attendants and compel them to accept its offers. These actions, it argued, constituted a violation of sections 50(a) and (b) of the Code. The consent of the Minister of Labour, under the terms of section 97(3) of the Code, was given on May 27, 1991.

Finally, the union alleged that on December 21, 1990, two flight attendants were unlawfully suspended for a period of two weeks following events that occurred on December 11, 1990. The evidence in those two cases was suspended at the request of the parties, and this decision does not deal with those matters.

B. File 950-186

Application for review of the safety officer's decision

Concurrently with the complaint of unfair labour practice, on January 14, 1991, the union asked Labour Canada to investigate the flight attendants' refusal to perform dangerous work on December 1, when they refused to make

flight 681 from Fort Lauderdale to Montréal. Section 129(1) provides as follows:

"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

The request for investigation, signed by Michelle Pallett, head of the union's health and safety committee at Nationair, was accompanied by a joint statement and the individual statements of the flight attendants describing the health and safety conditions that prevailed when they refused to work on December 1, 1990. This request followed the December 18 meeting of the union-management health and safety committee, at which the union and the employer were unable to agree on the merits of the refusal to work.

On December 19, Ms. Pallett notified the employer in writing that following that unproductive meeting, CUPE had no choice but to approach Labour Canada and the Canada Labour Relations Board to clarify the situation. On receipt of the notification, the safety officer conducted her investigation, and on February 11, 1991, she decided that the said refusal to work was not based on the existence of a danger within the meaning of the Code. Copies of that decision were transmitted to the union and the flight attendants. They were variously received between February 14 and 18, 1991.

On February 20, 1991, Ms. Pallett asked the safety officer to refer her decision to the Board for review. That request was entitled "Refusal to Work performed by NX flight attendants on NX Flight 681 in Ft. Lauderdale, Florida on

December 1, 1990." The first sentence of the document read as follows:

"Pursuant to section 133, subsection (1) of Part II of the Canada Labour Code, the Airline Division of CUPE requests that you forward your decision on the above noted Right to Refuse unsafe work cases to the Canada Labour Relations Board for review. ..."

(emphasis added)

Section 133(1) of the Code provides:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

In turn, section 147(a) states:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ... "

The document dated February 20 sets out the grounds on which the union is basing its application for review. On the same date, the flight attendants sent applications for review to the safety officer. These individual applications also refer to section 133(1) but do not mention the reasons in support of the application, as does Ms. Pallett's request.

On March 5, 1991, the safety officer informed Ms. Pallett that her request for reference was based on the wrong provision of the Code, namely section 133(1) of Part II, whereas such a request is provided for in section 129(5), which states as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

(emphasis added)

The safety officer explained the application of section 133(1) and specified that employees who wish to challenge an employer's decision they considered contrary to section 147(a) had to apply to the Board; this was not the safety officer's responsibility. On March 13, 1991, the safety officer sent the Board the request for reference of her decision, specifying that the reference was made pursuant to section 129(5) of Part II of the Code. That correspondence was received at the Board on March 14, 1991.

The employer, for its part, alleged that the requests for reference dated February 20, 1991 were not made within the seven-day time period stipulated in section 129(5). The safety officer's decision was dated February 11, 1991, whereas the requests for reference were received by Labour Canada on February 21, 1991. They were not submitted within the prescribed time period and should therefore be denied. Subsidiarily, the Board should not review the merits of the safety officer's decision since it was accurate and well-founded, as the attendants did not allege that a danger

existed within the meaning of the Code. Furthermore no danger existed on December 1, 1990.

C. File 950-189

Complaint of unfair labour practice filed on March 28, 1991

In a letter dated March 28, 1991, Amber Hockin-Jefferson, president of the health and safety section of CUPE's Airline Division, informed the Board that the flight attendants and the union still wished to avail themselves of the provisions of section 133(1). That letter stated that the union and flight attendants considered that they had complied with the requirements of the Code when, on February 20, 1991, they asked the safety officer to refer her decision to the Board "pursuant to section 133, subsection (1) of Part II of the Code" according to the terms used before. That letter was in response to the acknowledgement of receipt of the request for reference, which acknowledgement was sent by the Board to the parties on March 18, 1991. It referred to section 129(5) and not section 133(1), contrary to the original requests for reference.

Ms. Jefferson indicated that the references to section 133(1) were not errors on the part of the union and flight attendants. The fact that the safety officer felt that there had been an error and had unilaterally corrected it in her letters of March 5 and 13 did not alter this fact. The intention of the union and flight attendants was clear and obvious: they wished to bring a complaint before the Board under section 133(1) following a breach of section 147(a) of the Code, which the employer committed when it disciplined the flight attendants who had availed themselves of the provisions of Part II by exercising, on December 1, 1990, their right of refusal.

Ms. Jefferson asked that the request for reference of February 20, addressed to the safety officer, be considered a complaint filed under section 133(1). Should this not be possible, she asked that the letter of March 28 be considered an amendment of the applications of February 20 or, subsidiarily, as a complaint within the meaning of section 133(1). In that case, the union would like the Board to exercise its powers under section 16(m) of the Code and enlarge the 90-day time period applicable here (under section 133(2)) since clearly that time period expired on March 28, 1991.

The employer objected to the amended requests for reference and the letter of March 28 being received as complaints within the meaning of section 133(1). It relied on the following points. The requests for reference of the safety officer's decision, which makes a determination on the matter of the right of refusal of December 1, 1990, must be deemed to have been made under section 129(5), as the safety officer indicated in her correspondence addressed to the union and the Board.

In addition, the disciplinary actions of December 12, 1990, which are alleged to be violations of section 147(a) that must be disputed by means of a complaint under the terms of section 133, are not mentioned in these applications. While the request for reference signed by Ms. Pallett refers twice to a violation of section 147(a), this too is insufficient to satisfy the requirements of the Code. A complaint alleging violation of section 147(a) must be addressed to the Board by the employee and the facts and reasons supporting it must be specified in it, and this was not done. Therefore, the requests for reference of February 20, 1991 cannot be considered as valid complaints within the meaning of section 133(1) of Part II of the Code.

Furthermore, the letter of March 28, 1991 cannot be considered an amendment to the requests for reference seeking to add to them the constituent elements of a complaint filed under section 133(1), since the findings sought would be completely different from those sought in the requests for reference. Accordingly, the application to amend is inadmissible and must be denied.

Finally, the employer argued that the request to enlarge the 90-day time period in order to consider the letter of March 28 as a complaint within the meaning of section 133(1) cannot be granted. The Board cannot accede to this request, either pursuant to the powers conferred on it by section 16(m) or under the terms of the decision of the Supreme Court in Upper Lakes Shipping Ltd. v. Mike Sheehan et al., [1979] 1 S.C.R. 902; (1979), 95 D.L.R. (3d) 25; and 79 CLLC 14,192.

II

The Facts

The facts of the case before us may be summarized as follows.

1. On December 1, 1990, Nationair flight 680 left Mirabel for Fort Lauderdale at 9:15 a.m. and reached its destination on schedule. Flight 681, with the same crew and the same aircraft, a Boeing 747, was to leave Fort Lauderdale for Mirabel at 2:30 p.m.
2. The crew consisted of the captain, the first officer, the flight engineer, the flight director and 12 flight attendants. The number of persons assigned to such flights is in accordance with standards. Also on board was a captain in training.

3. Upon landing at Fort Lauderdale, the captain noted a mechanical problem, namely that the thrust reverser of engine 1 remained deployed, preventing the thrust lever from being advanced. In such a case, the engine cannot be started, and this mechanical problem therefore had to be repaired before the return flight from Fort Lauderdale could be undertaken. The flight engineer began attending to the problem at 1:00 p.m. However, the problem was not solved by the time the passengers were boarded at 1:45 p.m. nor by the scheduled time of departure, namely 2:30 p.m. In fact, the problem was not solved until 9:40 p.m. This long delay was attributable to the particular features of the aircraft and the lack of equipment available to the flight engineer for dealing with this type of problem. Furthermore, when the aircraft was ready for take-off, at approximately 10:00 p.m., other problems, this time of an electrical nature, arose. They were finally resolved at approximately 10:30 p.m.

4. Between 1:45 p.m. and 10:30 p.m., the captain spoke to the passengers four times. The first time, at approximately 2:45 p.m., he explained that the delay was due to an insufficient number of meals owing to the unexpected number of passengers. At that point, the flight director informed the flight attendants that there was a mechanical problem. The second announcement was made at 3:15 p.m., informing the passengers that there was a mechanical problem. The third announcement was made at approximately 8:20 p.m., to explain that the departure attempted at 8:00 p.m. had been unsuccessful as the problem was still not solved.

In the meantime, after an unsuccessful first attempt to take off, at 4:30 p.m., the captain had authorized all

passengers to disembark, upon which they received a meal voucher. Reboarding was scheduled for 6:30 p.m., with departure to take place at 7:00 p.m., but the latter was ultimately not attempted until 8:00 p.m. The captain spoke to the passengers a last time at approximately 8:45 p.m. to authorize them to leave the aircraft to smoke. At that time, he specified that if some passengers did not wish to remain on board to return to Montréal, this would cause a delay of approximately two hours since it would be necessary to return their baggage to them. This delay would mean that the flight attendants' period of duty would be over and the departure might not take place.

5. During this time, the flight attendants remained at their posts to answer the passengers' questions. No meal was served, but cold beverages were served at approximately 9:00 p.m.

The passengers were generally patient and polite, although there were of course a few disagreeable comments and signs of impatience. However, the situation began deteriorating after 10:00 p.m., when there were power failures.

6. At 10:37 p.m., the captain informed the flight director that engines 1 and 4 were functioning and that the aircraft was in condition to make the return flight to Mirabel. He asked that the doors be shut and preparations be made for departure. The flight director informed the flight attendants that the aircraft was ready for take-off, but some of them told her that they were refusing to leave since the time limit for not exceeding their duty time for that day had arrived: it was 10:40 p.m. We shall return to this

concept of duty time and its importance in the instant case.

The flight director informed the captain of the flight attendants' refusal. The captain asked to meet with them. All but one of the flight attendants reported to the captain. He ordered them to make the flight or they would be dismissed. He told them that if their duty time was exceeded on their arrival at Mirabel and if the collective agreement was not observed, they should resort to the grievance procedure. He informed them that he had established a new flight plan that would make it possible to complete the trip before their duty time expired, which meant that they would arrive at the gate at Mirabel before 1:45 a.m. on December 2. He added that he would ask the company to grant them an additional day of leave the following Sunday.

After some hesitations and discussions, during which it was proposed that there be a vote to determine whether to maintain their refusal to work (a vote did not actually take place), the flight attendants ultimately decided not to make the return flight. The captain informed the passengers of the situation and authorized de-planing.

7. The flight attendants' collective agreement provides that duty time cannot exceed 15 hours for a scheduled flight. However, in the case of a stopover delay, as occurred on December 1, that period may be extended to a maximum of 18 hours. It includes a period of preparation for the flight and a period on arrival or interruption of the flight. In the instant case, duty time had begun at 7:45 a.m., as the departure of flight 680 was scheduled for 9:00 a.m., and because of the

stopover delay, it was to end at 1:45 a.m. on December 2, that is, 18 hours later.

Furthermore, given the duration of the return trip as originally planned, it would be necessary to leave Fort Lauderdale by 10:40 p.m. in order to stay within the 18-hour maximum.

8. The captain was already aware of the flight attendants' reasons for refusing to make the flight. The flight director had informed him several times earlier in the evening that the flight attendants had calculated their duty time and had told her that they would refuse to leave at an hour that would result in their exceeding that time, that is, at 10:40 p.m. or later. In addition, at least two flight attendants had gone over this calculation with the captain at approximately 9:00 p.m. At about 9:30 p.m., the captain also looked into the matter with the supervisor of in-flight service administration, Jean Thibaudeau, who was on board. At that point, they both concluded that the time limit was 10:40 p.m. if the data for the initial flight plan for the return trip were maintained.
9. During the discussions and calculations concerning duty time, the flight attendants never invoked health and safety reasons to support their refusal, nor did they ever tell the flight director or the captain that their refusal was based on the existence of a danger, resulting either from an inability to deal with emergencies or from any other condition or circumstance of a nature to constitute a danger, owing to the situation that prevailed on the aircraft. Only duty time was invoked at that point as a reason for refusing to work.

Furthermore no action was taken and no request for an investigation was made in this regard either on arrival at Mirabel or in the days that followed. The question of health and safety was first raised by the employees on December 13, when the flight attendants registered their opinions on this subject. It was again raised at the meeting of the joint health and safety committee on December 18 and was ultimately submitted to Labour Canada on January 14.

10. At the hearing, the flight attendants submitted that their duty time had expired when the captain gave the order to depart. According to them, this situation would pose a danger, aggravated not only by the delay itself, but also by the lack of information, the heat that prevailed in the aircraft, the lack of food, the impatience of certain passengers and the state of the cabin after 10:00 p.m.
11. All flight attendants in question are members in good standing of the union, pursuant to the collective agreement. Not one holds a union representative or officer position. They have all regularly taken part in normal union activities (attendance at meetings, wearing the union pin, etc.), although some have been more active than others. On the whole, there was no increase or particular change in these union activities during the period when disciplinary actions were imposed. Bargaining for renewal of the collective agreement began on November 22, 1990.
12. Following the events of December 1, 1990, the employer conducted a disciplinary investigation focussing on the flight attendants concerned. This investigation took place on December 3 and 4, 1990. The flight attendants were called to an interview, which they attended

accompanied by a union representative. They answered a series of pre-determined questions; at the end of the interview, the employer asked them to put into writing their version of the facts, and a majority of them did so. The employer made its final decision in light of that investigation, and only the events of December 1 were taken into account. The employer did not take into consideration the contents of previous disciplinary records.

III

The Decision

A. File 950-189

No complaint under section 133(1) of Part II of the Code is before the Board.

No complaint alleging contravention of section 147(a) -- namely that the employer unlawfully disciplined the flight attendants who refused to make flight 681 from Fort Lauderdale to Montréal on December 1, 1990 -- was submitted to the Board in the form and within the time limits provided for in sections 133(1) and (2) of the Code.

The letter of March 28, 1991, received by the Board on the same day, cannot constitute a complaint within the meaning of section 133(1), since it was received by the Board more than 90 days after the date on which the flight attendants were informed of the disciplinary actions. The Board does not have the power to enlarge the time period of 90 days under sections 16(m) or 114 of the Code. Such was the ruling of the Supreme Court in Upper Lakes Shipping Ltd., supra.

Referring to section 16(m), Laskin, J., had the following to say:

"I read this provision as empowering the Board to abridge or enlarge the time for taking steps in a proceeding which is properly before it, as, for example, a certification proceeding. If, however, the issue is whether a proceeding is timely under the Board's governing statute, that is, whether the Board can lawfully entertain it at all in the light of s. 187(2), I do not regard its powers under s. 118(m) as entitling it to give latitude to a complainant who is out of time under the statute. The correlative would be that if it can enlarge it can abridge, and that would be absurd. A complainant is entitled to the advantage and is subject to the limitation of the ninety day period under s. 187(2). It can neither be restricted to a lesser period by any direction of the Board nor be allowed a greater period."

(pages 915; 34; and 44)

In the instant case, there is no dispute concerning the date on which the employees knew of the contested action, namely December 12, 1990. Consequently, the Board need not exercise its discretion to determine the date on which they learned of the event. This being said, the Board can only find that the 90-day period had expired by March 28, 1991, and it must conclude that the letter is not a valid complaint within the meaning of the Code.

Furthermore, the requests for reference of February 20, 1991, that is, the individual requests and the joint request signed by Ms. Pallett, cannot be received as complaints within the meaning of section 133(1), as the union requested. First, the reference to "section 133, subsection (1) of Part II of the Code" in the first sentence of these letters does not establish that these requests constitute complaints within the meaning of section 133(1). On the contrary, the individual requests for reference merely demand, specifically, that the safety officer send her February 11, 1991 decision to the Board for review; and that

decision dealt solely with the refusal to work of December 1, 1990.

The joint request signed by Ms. Pallett is similar. In addition, it sets out the reasons for considering the February 11, 1991 decision ill-founded and it goes over each of the findings of that decision. The twice-made claim that the employer violated section 147(a) cannot, of itself, change the primary nature of the letters of February 20, 1991, which are requests for reference of a safety officer's decision as to whether or not a danger existed within the meaning of the Code.

These requests of February 20 do not suffice to introduce the complaint, as the union alleged. There is no mention of events that might constitute a violation of section 147(a) either in these requests or in the request for an investigation, addressed to the officer on January 14, 1991, or the documentation accompanying it. On the contrary, the letter of December 19 from Ms. Pallett to the management representative the day after the meeting of the joint health and safety committee, which letter accompanied the request of January 14, specifies that the union "must communicate with a safety officer and the CLRB in order to clarify this situation" (translation). Yet the first time the union communicated with the Board was on March 28, 1991, in correspondence signed by Ms. Hockin-Jefferson. The requests for reference of February 20 are not complaints within the meaning of section 133(1) of the Code and cannot be received as such by the Board.

Also inadmissible is the union's request to amend the requests for reference in order to add the constituent elements of a complaint under section 133 of the Code. Section 16(n) empowers the Board "to amend or permit the

amendment of any document filed in connection with the proceeding."

However, that provision does not authorize the Board to allow an amendment which would have the effect of changing the nature of the original application or which would result in a breach of the principles of natural justice. In Bank Canadian National, Montréal (1979), 35 di 39; and [1980] 1 Can LRBR 470 (CLRB no. 189), the Board stated:

"... Certainly the Board would not allow any amendment which would change the nature of a case completely. If the Board condoned such a practice, a person could bring a complaint and add to it other complaints which would otherwise be inadmissible. If, for example, in the case before us the amendment had covered a violation of the Code which would have been inadmissible because it was not filed within the prescribed time period, clearly the Board would not have accepted it. Nor, it should be pointed out, would we entertain any amendment which would have the effect of taking the opposing party by surprise on the eve of a hearing, for example. ..."

(pages 44; and 474)

In Nationair (Nolisair International Inc.) (1986), 67 di 217 (CLRB no. 596), the Board reaffirmed as follows its power to receive amendments:

"It is clear that this power must be exercised without, however, breaching the rules of natural justice. If, by allowing one party to amend its application, the Board were at the same time tolerating a situation where the other party would be taken by surprise and would therefore not have the time or the information required to prepare its case, this action could certainly be termed an excess of jurisdiction. ...

...

However, the amendment approved by the Board could not have the effect of taking the respondent by surprise. It did not alter the nature of the complaint, which essentially alleged that the respondent punished the complainants for exercising a right recognized by the Code. ..."

(pages 219-220)

In the instant case, the Board has before it an application for review that it may decide under section 130(1):

"130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

On the other hand, when the Board upholds an appeal filed under section 133(1), it may do as follows:

"134. Where, under subsection 133(5), the Board determines that an employer has contravened paragraph 147(a), the Board may, by order, require the employer to cease contravening that provision and may, where applicable, by order, require the employer to

(a) permit any employee who has been affected by the contravention to return to the duties of the employee's employment;

(b) reinstate any former employee affected by the contravention;

(c) pay to any employee or former employee affected by the contravention compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to that employee or former employee; and

(d) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by the contravention, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer."

The remedies that the Board may order under these different provisions to rectify violations of the Code are neither similar nor sufficiently comparable to empower it to accept an amendment to an application made under section 129(5) for the purpose of adding the constituent elements of a complaint under section 133(1). Such an amendment would have the effect of changing the nature of the original

application and not merely adding to it or altering it to make it comply with the provisions of the Code.

In conclusion, as regards the admissibility of the application to amend, it is appropriate to distinguish the facts of the case before us from those found in Lila K. Walker et al. (1988), 73 di 126 (CLRB no. 678). In that case, the Board authorized the complainants to amend their complaints by replacing a reference to section 83(1) [now 123(1)] with a reference to section 85 [now 128]. The Board gave the following explanation:

"With respect, I disagree with the employer that to amend these complaints in the manner sought would be to create new complaints which would be subject to the time constraints in section 90(2) of the Code. From what I understand counsel for the complainants to be saying is that it is the same complaints based on the same facts and circumstances that they wish to proceed with under section 85. I cannot see how that can be regarded as initiating new proceedings. This is simply a clarification of existing timely complaints which the employer has had knowledge of all along. There are no new allegations against the employer and the amendments do not adversely affect Northwinds' ability to defend itself. ..."

(page 133; emphasis added)

For these reasons, the application to amend is denied.

B. File 950-186

Application for review of the safety officer's decision

The employees and the union ask the Board to review the safety officer's decision, which contains the following observations:

1. *the entire situation occurred in a foreign country being Fort Lauderdale, Florida, U.S.A. on December 1, 1990;*
2. *at the time of the occurrence, the undersigned Safety Officer was not called upon to investigate the situation in order to determine if the work performed by the concerned flight attendants constituted a*

danger to their safety and health. (Canada Labour Code, Part II, art. [sic] 129(1));

3. the refuse to work procedures outlined within the Canada Labour Code, Part II, were not followed;
4. the entire situation no longer exists;
5. any potential danger associated with the situation no longer exists."

The officer therefore ruled as follows:

"The undersigned Safety Officer, Marie Zubryckyj, decides that no danger exists for the safety and health of the concerned Nationair Flight Attendants.

Dated and signed in Dorval, Quebec on February 11, 1991."

At the beginning of these hearings, the employer brought up the failure to observe the seven-day time limit provided for in section 129(5). The Board notes that the requests for reference were sent to the safety officer within seven days following receipt of the decision, since they were received by the Department on February 21, 1991 and the employees received the decision variously between February 14 and 18, 1991. Consequently the employer's claim is without merit.

On the question of merits, the evidence does not support the conclusions of the union. The refusal to make flight 681 was based on a disagreement regarding the calculation of duty time and not on a question of danger within the meaning of the Code.

The intention, if not the decision, of certain flight attendants to refuse to leave Fort Lauderdale after 10:40 p.m. had been known for several hours. The flight attendants made their calculations more than once during the evening and informed the flight director that they considered the deadline to be inflexible. Some also told her that they would refuse to make the flight should it leave after 10:40 p.m. Their decision was for all practical

purposes finalized when they met with the captain. Neither during the hours leading up to the order to depart nor during their meeting with the captain did the flight attendants invoke or allege the existence or apprehension of a danger.

In Paul Laprise (1990), 80 di 137; and 13 CLRBR (2d) 151 (CLRB no. 793), the Board pointed out that it does not require that employees exercising their right of refusal say magic words. However, it emphasized that fears relating to safety must be well enough established and sufficiently clearly expressed for the person being addressed, acting in good faith, to grasp the meaning:

"What this establishes is that Mr. Laprise's work environment on October 13 was clearly deprived of any identifiable element that might have signalled to his supervisors that he was acting out of a true belief that his safety was at risk. When faced with the complainant's refusal, Mr. Davies was confronted with a situation where no safety motive was invoked and no readily identifiable danger was present. The Board believes Mr. Davies when he says he disciplined Mr. Laprise for refusing a normal work assignment.

This point brings me to another aspect where this complaint is different from the other cases referred to. It is the clarity with which an employee reports or communicates a safety concern as a basis for his action. This element never seemed to be at issue in the cases referred to above or cited in support of the union position. However, it is in the present one. During his testimony, Mr. Laprise told the Board that he was aware he had the right to refuse work over safety concerns but did not know the proper procedure. Yet, it seems strange that when warned on the Thursday afternoon and the Friday morning of disciplinary action, he replied in terms of training time and responsibility, not safety ones. This is not to suggest a restricted or overly procedural manner or form in which this concern has to be expressed or reported. Indeed, in John Charters, supra, the Board said:

'... there is no magic in the words contained in the Code, they need not be uttered by a refusing employee. Provided that it is clear that an employee is refusing to work because of a concern for danger to themselves or to another employee, the obligation to report the matter to the employer under section 128(6) is fulfilled. ...'

(pages 198; and 263)

As noted above, this clarity of a safety-related motive is missing in this case, with the result that there was never any doubt in the supervisor's mind that Mr. Laprise was being disciplined for refusing a training assignment over reasons other than safety."

(pages 145; and 159-160)

The case before us resembles that of Monica McHugh et al. (1989), 78 di 1 (CLRB no. 743), in which the Board stated:

"The root cause for the complainants' refusal to work was undoubtedly their frustration over the initial flight delays and the non-acceptance by their employer that their duty day had commenced around noon when the pre-flight briefing took place in Mr. Soucy's hotel room. As the afternoon wore on and their patience wore thinner, they used the non-functioning equipment items aboard the aircraft to bolster their stance that their duty day was being unduly extended, and that a double crew was warranted. Then, having failed to make their point, they walked off the job."

It was not until they were advised of their rights by Labour Canada, where they went to complain about unjust dismissal, that the complainants made a serious issue about their safety concerns."

(page 11)

In the case before us, there is no denying that the various problems that occurred throughout the afternoon and evening were not of a nature to enhance the work atmosphere; rather they served to increase the frustration. Of further aggravation was the captain's uncommunicativeness in terms of the frequency and the nature of his announcements to employees and passengers alike regarding the situation that prevailed during the long waiting period.

However, these elements do not prove the existence of a danger within the meaning of the Code, and the Board can only find that the safety officer's decision need not be reviewed.

This application for review raises another question, which relates to the way in which the Board exercises its jurisdiction in this type of application.

In Canada (Attorney General) v. Bonfa (1989), 73 D.L.R. (4th) 364; and 113 N.R. 224, the Federal Court of Appeal held that the safety officer must determine whether there is a danger at the time of the investigation and not at the time of the allegation of danger by the employee. The Court said the following:

"... The function of the safety officer is not to decide whether the employee was right in refusing to work in his workplace but whether, at the time the officer did his investigation, a condition existed in the workplace that constituted a danger to the employee. ..."

(pages 369; and 230)

After reviewing the provisions of sections 130(1) and 129(4), the Court concluded:

"In my opinion, all these provisions clearly indicate that s. 128(1)(b) authorizes the employee to refuse to work in a place because of the dangers it presents and that the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers that employees were justified in not working there."

(pages 370; and 230-231)

That decision confirmed in this regard the decision rendered in Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630.

It follows from those decisions that the Board, when required to rule on an application for review, must determine whether the safety officer properly assessed the facts that existed at the time of the investigation and not the situation at the moment when according to the employee's allegation there existed a danger. In practice, depending on the nature or the source of the alleged danger, that danger either will still be present or will not. In

Richard Boivin et al. (1992), as yet unreported CLRB decision no. 916, the Board summarized its role in this regard as follows:

"... If the Board concludes that there was no danger at the time of the investigation, then it must confirm the officer's decision.

If the Board concludes that there was a danger, it must then put itself in the shoes of the safety officer and issue any direction that it considers appropriate. ...

Before issuing such a direction, however, the Board must determine whether there is still a danger at the time of its inquiry. Section 130(1) states that the Board may give any direction that it considers appropriate. The Board is not required to give a direction whenever it finds that a danger existed at the time of the safety officer's investigation. It makes no sense for the Board to issue a direction to protect against a danger that does not exist. ..."

(page 18)

Should the Board conclude that the officer erred and a danger existed at the time of the investigation, it must exercise its discretion in determining whether or not it must issue an order to correct the dangerous situation. It must exercise this discretion on the basis of whether such an order is applicable or relevant, taking account of the particular circumstances of each case.

In the instant case, the Board considers that the safety officer rendered the proper decision when she determined that at the time of her investigation the dangerous situation no longer existed and that she therefore could not conclude that a danger existed on December 1, 1990.

C. File 745-3830

Complaint of unfair labour practice under section 97

At the beginning of the hearing, the employer asked the Board to refuse to hear and determine the complaint alleging

violation of sections 94(3)(a), 94(3)(b) and 96 of the Code and to apply section 98(3), which states:

"98.(3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board."

The Board took this request under advisement and indicated that it first wished to hear the evidence, since there were various applications based on the same facts. Having considered the evidence as a whole, the Board considers that it is not appropriate to deal with the merits of the allegations of violation of sections 94(3)(a), 94(3)(b) and 96 of the Code.

In Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800), the Board asked the following question in order to determine whether section 98(3) should be applied:

"Is there in this case a genuine statutory right that the Board must define or reassert? After having reviewed the evidence and the parties' submissions and on the basis of the evidence, we find that there is none."

(pages 38; and 127)

In the instant case, the Board has reached an identical conclusion. It considers that there is no fundamental right at issue here that requires its intervention. The arbitrator before whom grievances against disciplinary actions are brought has the jurisdiction required to determine whether or not such actions are appropriate. However, in order to ensure that this decision is acted upon it is useful to note what was said at the hearing by counsel for the employer regarding the effect of section 133(4) with regard to the exercise of the arbitrator's jurisdiction. That provision reads as follows:

"133.(4) Notwithstanding any law or agreement to the contrary, a complaint referred to in subsection (1) may not be referred by an employee to arbitration."

Mr. Tremblay, in response to counsel for the complainants who was concerned about the effects of this provision if section 98(3) were applied, specified that if the Board accepted his arguments regarding the non-existence ab initio of complaints within the meaning of section 133(1) (and the Board did in fact make a determination to this effect above), then section 133(4) did not apply. The Board takes note of the point raised by Mr. Tremblay.

In addition, the Board has suspended the deliberations on the part of the complaint alleging that the employer breached its obligation to bargain in good faith. At the beginning of last May, the Board received from the parties two complaints under section 50(a) (files 745-4232 and 745-4233). The Board held a hearing on June 1. At the request of the parties, it suspended that hearing and issued an order calling for a resumption of bargaining, which subsequently took place. When the hearing resumed on June 17, the parties stated that bargaining was continuing with the assistance of a mediator. The Board again suspended the hearing until June 22 to facilitate the continuation of bargaining. In the meantime, the employer on June 12 asked that its complaint be withdrawn. On June 22, the union made the same request with regard to its complaint. Following the submissions of the parties, the Board upheld those requests and granted the withdrawals. However, in light of the current state of negotiations, it has asked that the union advise it of what it intends to do with respect to the allegations of bad faith bargaining in the instant case.

General Finding

File 950-189

The Board dismissed the requests based on section 133.

File 950-186

The Board confirmed the safety officer's decision and dismissed the request for reference of the February 11, 1991 decision of the safety officer.

File 745-3830

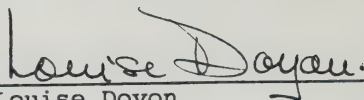
Pursuant to section 98(3), the Board refused to hear and determine the part of the complaint of unfair labour practice dealing with sections 94(3)(a), 94(3)(b) and 96.

The Board suspended the deliberation concerning the part of the complaint alleging bad faith bargaining on the part of the employer. The Board shall inform the parties in due course of how to proceed on it.

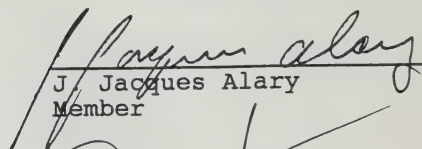
As to the parts of the complaint which challenge the imposition of suspensions on two flight attendants, the hearing of which has been suspended, the union and the complainants shall inform the Board of their intentions in this regard within 15 days following receipt of these reasons.

This decision is an interim decision within the meaning of section 20(1).

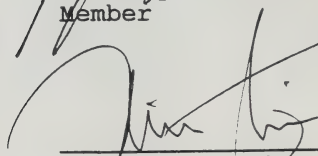
This decision is unanimous.



Louise Doyon
Vice-Chair



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 10th day of July 1992.

CCRT/CLRB - 943

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SUMMARY

CANADIAN PACIFIC LIMITED, APPLICANT, AND NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; AND MR. ABE ROSNER, RESPONDENT UNIONS, INTERVENOR AND INTERESTED PARTIES.

RÉSUMÉ

CANADIEN PACIFIQUE LIMITÉE, REQUÉRANTE, SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA (TCA - CANADA), FRATERNITÉ INTERNATIONALE DES OUVRIERS EN ÉLECTRICITÉ (FIOE), ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE (AIM), ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET DE LA TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA, FRATERNITÉ INTERNATIONALE DES CHAUDRONNIERS, CONSTRUCTEURS DE NAVIRES EN FER, FORGERONS, FORGEURS ET AIDES, ASSOCIATION INTERNATIONALE DES TRAVAILLEURS DU MÉTAL EN FEUILLES, FRATERNITÉ INTERNATIONALE DES CHAUFFEURS ET HUILEURS, ET M. ABE ROSNER, SYNDICATS INTIMÉS, INTERVENANT ET PARTIES INTÉRESSÉES.

Board File: 530-1848

Dossier du Conseil : 530-1848

Decision No.: 944

Décision n° : 944

This decision involves a bargaining unit review application, filed by the employer pursuant to section 18, in respect of its shopcraft employees. The shopcraft employees perform major and minor repairs and maintenance on the employer's freight cars and locomotives. The Board found that the existing situation, with employees organized along craft lines in seven bargaining units, was no longer appropriate.

La présente décision fait suite à une demande de révision visant la structure des unités de négociation présentée par l'employeur relativement aux employés de métier d'atelier. Ces employés effectuent des réparations majeures et mineures et s'occupent de la maintenance des wagons et des locomotives. Le Conseil a conclu que la situation actuelle, soit le regroupement des employés à l'intérieur de sept unités de négociation organisées selon les métiers, ne convient plus.

The Board noted the existence of a considerable overlap in the functions performed by the different crafts on the railway. In some shops, employees in several crafts work in groups under the supervision of a supervisor who may or may not be a member of one of the crafts included in the working group. The Board noted that the employees have similar

Le Conseil souligne le chevauchement considérable des tâches qui se rattachent aux divers métiers exercés dans le secteur ferroviaire. Dans certains ateliers, les employés de divers métiers travaillent ensemble sous la direction d'un superviseur qui peut ou non être membre du corps de métiers dont est constitué le groupe de travail. Le Conseil signale également que la

levels of training, similar working conditions and a common wage structure and concluded that there is a very substantial community of interest among the employees covered by the application.

The Board also noted that, while the employer's evidence did not reveal any significant number of actual work jurisdiction disputes, the archaic craft rules which restrict work assignments continued to exist. Such rules would not likely be bargained away by the parties since their continuance is the justification for the existence of some of the bargaining agent organizations.

The Board concluded that the lateral mobility and thus the long-term job security of employees would likely increase if the bargaining unit were consolidated. One consolidated bargaining unit would also result in more effective and consistent collective agreement negotiation and administration.

The Board ruled that the establishment of two bargaining units among employees would not be in the long-term interest of employees. Nor would it assist in achieving sound collective bargaining and efficient collective agreement administration. The Board found to be appropriate for collective bargaining one bargaining unit consisting of all employees of Canadian Pacific Limited and its subsidiaries employed in the Locomotive Department, Car Department and Operating Department and designated as Tradesman, Apprentice, Helper, Engine Attendant and Shop Labourer. The Board indicated that it would entertain submissions with respect to the selection of a bargaining agent to represent the consolidated bargaining unit.

formation, les conditions de travail et les régimes de rémunération des employés sont semblables, et qu'il existe une forte communauté d'intérêts parmi les employés visés par la demande.

En outre, bien que l'employeur n'ait pu faire la preuve qu'il existe, en réalité, un nombre significatif de conflits juridictionnels entre syndicats, les règles archaïques qui entravent la répartition des tâches perdurent. Il est improbable que la négociation mène à leur abolition, puisque leur existence justifie celle de certains agents négociateurs.

Le Conseil en est arrivé à la conclusion qu'une unité de négociation consolidée mènerait à une mobilité latérale accrue et qu'il en résulterait, à plus long terme, une meilleure sécurité d'emploi. Une telle unité élargie permettrait également d'assurer la négociation et l'application plus efficaces et plus cohérentes des conventions collectives.

Le Conseil a également déterminé qu'il ne serait pas dans l'intérêt des employés, à long terme, d'établir deux unités de négociation. Cela n'aiderait pas à créer de saines relations de travail ni à assurer l'application efficace des conventions collectives. Le Conseil a jugé habile à négocier collectivement une unité composée de tous les employés de Canadien Pacifique Limitée et de ses filiales affectés au service des locomotives, à celui des wagons et à celui des opérations et désignés sous le titre d'ouvrier, d'apprenti, de préposé aux locomotives et de manoeuvre d'atelier. Le Conseil a indiqué qu'il accueillerait les arguments concernant la désignation d'un agent négociateur représentant l'unité de négociation élargie.

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Reasons for decision

Canadian Pacific Limited,
applicant,
and

National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada); International Brotherhood of Electrical Workers; International Association of Machinists and Aerospace Workers; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Sheet Metal Workers' International Association; International Brotherhood of Firemen and Oilers; and Mr. Abe Rosner,

respondent unions, intervenor and interested parties.

Board File: 530-1848

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Ginette Gosselin and Mr. Michael Eayrs, Members.

Appearances

Messrs. M. Shannon and D. Courcy, for the Canadian Pacific Limited (CP);

Mr. S. Waller, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada);

Mr. J. Shields, for the International Association of Machinists and Aerospace Workers (IAM);

Mr. F. Côté, for the International Brotherhood of Electrical Workers (IBEW);

Mr. M. Church for the United Association of Journeymen

and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (UA), International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (BBF), Sheet Metal Workers' International Association (SMW) and International Brotherhood of Firemen and Oilers (IBFO); Mr. A. Rosner, intervenor.

Hearings on the merits of this matter were held at Montréal, April 2-5, April 8-9, May 21-24, June 4-7, July 16-18, October 15-17, November 19-21, December 3, 4 and 6, 1991.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This matter involves an application filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) to review the bargaining units currently established in respect of the shopcraft employees of the applicant employer. As determined in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 892, the International Brotherhood of Firemen and Oilers, although not strictly speaking a craft union, is to be considered a "shopcraft" union for the purposes of this application.

The Board heard very extensive evidence in this matter, going particularly to the company's alleged difficulties arising out of the fact that its shopcraft employees are represented by a number of organizations established on craft lines, and to the bargaining history of the parties, especially that relating to the period since the present units were established in 1986, as a result of

this Board's decision in Canadian National Railway Company et al. (1986), 64 di 70 (CLRB no. 556).

I

In considering this evidence, and in assessing such matters as community of interest of employees, regard must be had to the basic factual context (as we view it) which underlies the situation.

The company's shopcraft employees are now divided into seven bargaining units which are, with more or less precision, representative of the trades or crafts practised by the employees within those units or in respect of which such employees are apprentices or helpers. It is clear from the evidence that there are many instances in which the skills used in the performance of particular tasks overlap between these craft groups. At the time of the application, each bargaining unit had as bargaining agent a craft union, these craft unions being among the oldest trade unions existing today. Such unions have been the bargaining agents for the employees in question, or their predecessors, for roughly a century. Over the years, as times and technology have changed, the number of bargaining units has diminished, and certain trade unions have merged with others, have ceased to represent railway workers or have simply disappeared. The number of persons employed in the various trades - in both relative and absolute terms - has changed considerably over the years, and the absolute numbers declined - significantly - during the course of these hearings.

It is interesting to consider the relative sizes of these bargaining units. At the time of the officer's report in this matter they were as follows:

"a)	<u>Canadian Auto Workers - Rail Division</u>	<u>Number of Employees</u>
	Trades	1,895
	Helpers	115
	Apprentices	65
	Coach Cleaners	<u>12</u>
		2,087
b)	<u>International Association of Machinists</u>	
	Trades	984
	Helpers	163
	Apprentices	<u>42</u>
		1189
c)	<u>International Brotherhood of Boilermakers</u>	
	Trades	187
	Helpers	22
	Apprentices	<u>5</u>
		214
d)	<u>International Brotherhood of Electrical Workers</u>	
	Trades	516
	Helpers	51
	Apprentices	<u>30</u>
		597
e)	<u>Association of Plumbers and Pipefitters</u>	
		125
	Trades	
f)	<u>Sheet Metal Workers</u>	
	Trades	68
	Helpers	<u>2</u>
		70
g)	<u>Brotherhood of Firemen and Oilers</u>	
		556
	Labourers	<u>137</u>
	Engine Attendants	693
	Overall Total	4,975"

To achieve journeyman status in each of these trades, an employee must conclude an apprenticeship programme (from time to time, equivalents have been established in terms of education and practical experience). The case of the Brotherhood of Firemen and Oilers is of course an exception. The case of the Canadian Automobile Workers - Rail Division (formerly the Brotherhood Railway Carmen of Canada) is if not exceptional at least somewhat different, a shorter apprenticeship period having been developed; the Carmen's craft involves performance of the work of a number of trades which have evolved, in the railway context, as facets of the same general work.

Since this application was filed, the Brotherhood Railway Carmen of Canada merged with the Canadian Automobile Workers, which is an industrial and not a craft union. We shall refer to members of this bargaining unit as Carmen. The bargaining unit for which the CAW presently holds bargaining rights remains, of course, the same as that previously represented by the Brotherhood Railway Carmen of Canada.

The work performed by shopcraft employees may be very roughly divided into that of major and minor repairs and maintenance. Major repairs are carried out at main shops. At the time of this application, there were three main shops, located at Montréal, Winnipeg and Calgary. During the course of these proceedings the company announced and carried out the closure of its Angus Shops, at Montréal. At the time of the application, somewhat less than half (2128) of the employees in the bargaining units in question worked at main shops. Repair and maintenance other than major repair is carried out at line shops or line points (sometimes called running

points), which vary considerably in size and relative complement from one union to another.

The more important line shops may be staffed with a mixture of members of the various unions involved (rarely the Plumbers and Pipefitters or Sheet Metal Workers). The major union represented in line shops, however, is clearly the Carmen; in main shops, on an overall basis, the IAM have the greatest representation, but main shops (like most of the larger line shops) are divided into car shops (in which the Carmen predominate), and diesel shops (in which there are very few Carmen). The larger line shops (Saint-Luc, Toronto, Winnipeg, Alyth, Coquitlam) have employees coming within most (and in Toronto, all) of the bargaining units involved. While the Carmen in each of these cases represent the largest number of employees, the division into car shops and diesel shops is usual. Apart from the 5 shops just referred to, there are some 47 line shops or line points, 5 of which have more than 50 employees, and 15 of which have only 1 or 2 employees. Very small line points are in most cases staffed by Carmen although often members of the Brotherhood of Firemen and Oilers, and in a few cases members of the IAM or the IBEW may be found.

Although there has, as we have noted, been a significant reduction in active employment since the time of filing of this application, the relative sizes of the various bargaining units remain approximately the same.

The only significant staffing pattern that appears from the evidence is that work on freight cars is for the most part performed ~~by~~^{by} Carmen, while work on locomotives, not surprisingly, involves a number of specialized crafts.

Since motive power is now diesel-electric, the number of boilermakers and of plumbers and pipefitters has been greatly reduced from what it was many years ago. Boilermakers now essentially perform heavy metal fabrication. But since freight cars are now of steel construction, not of wood, the tasks of Carmen have also changed (although they continue to perform work involving a number of crafts), and Carmen, too, are frequently engaged in heavy metal fabrication as, from time to time, may be machinists and others.

II

There has, with time, been considerable blurring of the edges of the traditional crafts on the railways, and there is considerable overlap of functions. The evidence is that, to a very important extent, skilled tradesmen could, using their own tools, perform perhaps with some familiarization most - although certainly not all - of the tasks required to be performed in the company's shops. The craft unions have consistently opposed the concept of a "composite mechanic" classification, and the company asserts that it is not its present intention to develop such a classification. The company does, however, argue that in order to operate efficiently, it must have flexibility in assigning work, so that assignments may be made on the basis of ability and qualifications to perform tasks, unrestricted by what it considers to be the archaism of the "craft rules" set out in each of the collective agreements.

Two comments should be made on what has just been said. First, the craft rules and any restrictions on what might otherwise be management's right to assign work are

matters for collective bargaining, and such matters are now dealt with in the collective agreements. If the Board redefines the bargaining units in the manner sought in this application, that will not involve any determination with respect to assigning work. Second, there is no issue before us as to the requirement of accreditation within a craft for the performance of certain work. The assignment of work is, among other things, a function of skill and qualifications, and there is no doubt that for some work assignments to be properly made, the person to whom the work is assigned must be appropriately accredited within the appropriate craft. That requirement may simply arise from the nature of the work to be performed, or it may be imposed by law. This decision could not and does not deal with such matters.

Our concern is with the definition of a bargaining unit or units that will be appropriate for collective bargaining. The Board has recognized, however, that the goal is effective collective bargaining and that one aspect of such effectiveness - for the ultimate benefit of all concerned - is the ability of an enterprise to operate efficiently. Where a bargaining structure overemphasizes the institutional interests of the bargaining agents this goal may not, as a practical matter, be achievable. These are considerations which, in our view, may properly be borne in mind in determining what unit or units may be appropriate for collective bargaining in any particular situation.

The very general outline which we have given of the company's shopcraft operations shows that there are considerable variations in the surroundings in which

employees may work. A majority of the shopcraft employees work in what may be described as heavy industrial plants. Many, however, work in isolation or near isolation (relative to other shopcraft employees) and in a small-shop atmosphere. There is, generally, an observable distinction between work on locomotives and work on freight cars. To a certain degree, these distinctions of work place and, more importantly, of the nature of work are reflected in the memberships of the several bargaining agents.

While these factors are material to the question of community of interest, they are certainly not determinative of it, and in the instant case give no very clear indication of the appropriateness of any particular unit for collective bargaining purposes. The diversity of circumstances we have described is found, to a greater or lesser degree, with respect to each of the present bargaining agents. While it is true that Carmen constitute the principal element of the employment force in car shops, and that "the others" constitute the principal element of the employment force in diesel shops, this distinction relates principally to the larger installations where there is a clearly defined car shop and a clearly defined diesel shop. In such locations, Carmen may perhaps be perceived by some as a distinguishable group, but this observation does nothing to solve the problem of bargaining structures for the other employees, nor for Carmen working, as many do, at smaller points. For each of the crafts - including the Carmen - the continued existence of a separate bargaining unit would appear anomalous, given the nature of the work and the diversity of circumstances in which it is performed.

Typically, where the size of operations at a given shop calls for it, employees in several crafts form working groups that report to a supervisor who may or may not be a member of one of the crafts included in the working group. Employees are not necessarily supervised by a member of their own craft. Plant facilities are not, in any significant way, exclusive to members of particular craft groups. While there are many collective agreements applying to the employees affected by this application, it is the case that all journeymen, whatever their craft, are entitled to the same rates of pay, and the same is true for helpers and apprentices.

It may be argued that what distinguishes one group of employees from another is the work performed and the craft skills and qualifications required to perform it. On the evidence, this distinction is more one of institutional adherence than of actual work performed. A substantial majority of the tasks actually performed could be performed by virtually any member of the skilled work-force. That is, "core craft skills" are called on for a minority of the tasks required to be performed, although the extent to which this is so varies from one craft to another. We would repeat, however, that craft skills do remain essential to the employer's operations, and would add that nothing in the evidence suggests that a substantial requirement for persons fully qualified in various skilled trades will not continue. Both the work to be done and the craft skills required to do it have evolved and continue to evolve.

III

The company's rail operations are vast and complex, and the interrelationships of the various groups of employees necessarily involve many areas of unclear demarcation. It is possible nevertheless to recognize a number of distinct groupings where the employees' community of interest can be recognized and where, historically, collective bargaining patterns have reflected such distinctions. Thus, the "running trades" have been considered as a group - or groups - apart, as have clerical employees, maintenance of way employees and certain other more specialized groups. The shopcraft employees have long been recognized as having many features in common, one such feature no doubt being pride of craft. At one point, of course, the shopcraft employees were indeed included in a single bargaining unit, the bargaining agent for which was a council of shopcraft unions, which held a certificate from this Board. That certificate was revoked by the Board's decision in Canadian National Railway Company et al. (556), supra, (CLRB No. 556), and the fragmented unit, in its present form of several units, was established. As we said in an interim decision in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845, which is analogous to the present case, the substantial issue in Canadian National Railway Company et al. (556), supra, was the viability of the council of trade unions. As the Board noted in decision no. 845, the present case raises, for the first time, the question of the continuing appropriateness (for this employment situation at least) of certification on craft lines.

In dealing with the "non-suit" motion brought in this matter by certain respondent trade unions (Canadian Pacific Limited, supra), the Board concluded as follows:

"We are of the view that it is appropriate to consider a change in the bargaining unit structure in the company's shops because while this structure has been altered considerably over the years, it has always retained its fundamental 'craft' character. Employees, naturally enough, organized on craft lines in the latter nineteenth century, long before the current notion of 'bargaining unit' had been formulated. Since that time there have been social, economic, organizational and technological changes which have revolutionized not only work and the workplace but also the workers themselves and their institutions. Of course, recognition that such changes have occurred does not require the conclusion that there should be any change in any particular grouping of employees or, as is the case here, in any particular bargaining unit. The recognition of fundamental contextual change, however, together with a consideration of the company's view of its bargaining and administration difficulties and, more importantly, those of the trade union representing the largest number of the employees concerned, lead us to conclude that it is proper at least to consider the appropriateness of the present bargaining units."

(pages 5-6)

The fragmentation which now characterizes the shopcraft group is not the result of a determination by the Board in favour of fragmentation as such. The Board's policy, very generally, may be said to be one in favour of broader-based collective bargaining. More important than any general policy considerations, however, is an assessment of the individual bargaining situation. Thus, in AirBC Limited (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), the Board recently revised a certificate that had been on "industrial" lines, issuing instead a series of certificates to separate bargaining agents representing separate units of employees of that employer. In that case, however, the nature and circumstances of the work, skills and

community of interest of the several groups of employees showed very clear differences which do not exist in the instant case.

In the instant case, all of the craft employees in the bargaining units involved perform tasks which come within the scope of traditional industrial craft work. The other employees in these units perform supporting functions with respect to such work. Variations in working conditions relate to the size of the particular shop more than to craft affiliation. Employees are assigned to mixed working groups where appropriate, share common facilities, receive the same wages and benefits and are subject to collective agreements most of whose terms are identical. Indeed, for employees in the true craft units, their classifications for administrative purposes are the same, all journeymen being classified as "Mechanical Tradesman". The employees in question thus have similar levels of training, roughly similar working conditions and a common wage structure. Unsatisfactory as various suggested definitions of "community of interest" may be, it seems clear to us in this case at least that there is a very substantial community of interest among the employees covered by the application. In our view, it is no longer appropriate that such employees be organized in separate units for purposes of collective bargaining.

IV

There can be little doubt that if the application before us were one for initial certification, the Board would find that one bargaining unit would be appropriate for collective bargaining. Indeed, it would seem likely that such a unit would be defined on industrial lines, rather than in terms of crafts, as we have indicated would in any event be the case here. Most - indeed, virtually all - large bargaining units in modern heavy industry include employees having craft qualifications in the same unit as unskilled and other workers. This is not, however, an application of that sort. As we have indicated, this application involves relationships and organizations which are deeply rooted in railroad history and to which we owe great respect.

While there is no specific presumption in favour of all-employee (or even "all craft employee") bargaining units (see Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726), pages 182-183), the Board has long favoured the larger, more comprehensive unit. In Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), the Board adopted an analysis of the relevant factors set out in the decision of the British Columbia Labour Relations Board in Insurance Corporation of British Columbia, [1974] 1 Can LRBR 403 (B.C.), pages 408-411. The factors there considered included the following:

- administration efficiency and convenience in bargaining;
- enhancement of lateral mobility of employees;
- facilitation of a common framework of employment conditions;
- increased industrial stability.

The importance of these factors was confirmed and additional related factors were discussed in the recent Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675), the additional factors including the following:

- overlap in the work performed by members of different bargaining units;
- common supervisory responsibility;
- operational contact between members of the various units;
- similarity of collective agreement provisions;
- the existence of work jurisdiction disputes.

With respect to each of these factors, a consideration of the facts of the present case favours the establishment of a single bargaining unit. The first four of those just mentioned have already been dealt with in these reasons. As to the last, work jurisdiction disputes, it must be said that the company's evidence in this matter did not reveal any significant number of actual disputes between unions in respect of jurisdiction. Although the development and application of the incidental work rule would appear to have reduced very considerably the number of wasteful occasions when the performance of core craft work would have to await the performance of a simple incidental function, such as the removal of a cover plate, by an employee coming within the scope of the appropriate craft rules, it nevertheless remains that the often archaic craft rules still exist and restrict work assignment. While it is theoretically possible for the parties to bargain these rules away, the real likelihood of this is slight, given that their continuance is the justification for the existence of certain of the bargaining agent organizations.

We have no doubt that, both as a general matter and in the particular circumstances of the railway shops, lateral mobility, and thus the long-term job security of employees, is more likely to increase where the bargaining unit is consolidated. As well, at both the local and national levels, the administration of a collective agreement has a better chance of being effective - and consistent - where a trade union's services can be provided in depth and from a larger resource base. The same is true of the negotiation process. It is true that the number of negotiations between the several parties has not, historically, been as great as the number of bargaining units would permit, but the potential for multiple negotiations is there, and the fact is that dual negotiations, with shifting alliances of bargaining agents, has been the rule in recent years. The company's expressed fear of "whipsawing" has not been justified historically. A more telling argument in favour of one unit, as far as negotiations are concerned, is, we think, the increased power and resources of the collectivity in the larger unit.

The Board was asked, by all trade unions except the CAW, to consider the possibility of establishing two bargaining units if we considered - as we do - that the status quo was not appropriate. One unit, it was suggested, would be a unit of Carmen, and the other a unit consisting of all the other crafts. Such a unit, in our view, would be unlikely to satisfy any of the criteria we have just discussed. It would not give employees the broad resource base on which bargaining power resides; it would accentuate rivalry between groups of employees working together; it would do nothing to

improve the consistency or efficiency of collective agreement administration. The only real justification for the establishment of two units among employees having substantial community of interest would appear to be the accommodation of the vested interests of existing organizations, not the long-term interests of employees nor the achievement of sound collective bargaining and efficient collective agreement administration.

In general, employee wishes are not a factor of importance in the determination of bargaining units. Given the historical context of the present bargaining unit structure however, and bearing in mind that a certain emotional attachment to the long-established and skill-focused organizations involved here might be expected, we think it noteworthy that although the present application was, in accordance with the Board's procedures, posted at the employer's shops throughout Canada, only one employee intervention was received, being that of Mr. Rosner, Executive Secretary of the Canadian Council of Shopcraft Unions, and who was accorded intervenor status in these proceedings. Accordingly, while we would repeat that we have the greatest respect for the collective bargaining relationships that have developed in the railway industry over the past century or more, we consider that it is a set of relationships that must continue to develop and evolve, and there is no reason not to think that most employees recognize that.

Having regard to all of the foregoing and to the evidence set out at the hearing and in the officer's report in this matter (save where the latter has been the subject of viva voce evidence), the Board finds the following unit of employees to be appropriate for collective bargaining:

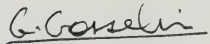
"all employees of Canadian Pacific Limited and its subsidiaries employed in the Locomotive Department, Car Department and Operating Department and designated as Tradesman, Apprentice, Helper, Engine Attendant and Shop Labourer."

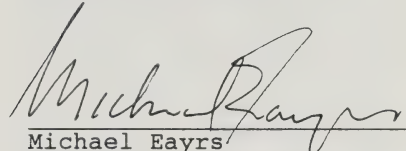
We would note that within the bargaining unit thus described will be the road and terminal electricians, who are presently covered by the Board's certificate, dated March 25, 1985, issued to the IBEW, although their particular terms and conditions of employment are dealt with in a separate collective agreement (wage agreement no. 34).

There remains to be decided the matter of the bargaining agent entitled to represent the employees in the bargaining unit we have determined to be appropriate. In its reply to the application, the Canadian Automobile Workers applied for certification, in the event such a unit were determined to be appropriate. In a subsequent application for certification, the Canadian Council of Railway Unions has made a similar request. That application, which had been held in abeyance at the applicant's request, will now be processed in accordance with the Board's usual procedures, and will be dealt with together with the instant case. The Board will entertain

any other submissions with respect to the matter of representation which may be filed with the Board before the close of business on July 31, 1992.

J.F.W. Weatherill
Chairman


Ginette Gosselin
Member of the Board


Michael Eayrs
Member of the Board

ISSUED AT OTTAWA, this 10th day of July 1992

CLRB/CCRT - 944

information

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SUMMARY

RÉSUMÉ

CANADIAN NATIONAL RAILWAY COMPANY, APPLICANT, NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, RESPONDENT UNIONS.

LA COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA, REQUÉRANTE, LE SYNDICAT NATIONAL DES TRAVAILLEURS ET TRAVAILLEUSES DE L'AUTOMOBILE, DE L'AÉROSPATIALE ET DE L'OUTILLAGE AGRICOLE DU CANADA (TCA - CANADA); LA FRATERNITÉ INTERNATIONALE DES OUVRIERS EN ÉLECTRICITÉ; L'ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE; L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET DE LA TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA; LA FRATERNITÉ INTERNATIONALE DES CHAUDRONNIERS, CONSTRUCTEURS DE NAVIRES EN FER, FORGERONS, FORGEURS ET AIDES; L'ASSOCIATION INTERNATIONALE DES TRAVAILLEURS DU MÉTAL EN FEUILLES, SYNDICATS INTIMÉS.

Board File: 530-1850

Dossier du Conseil : 530-1850

Decision No.: 945

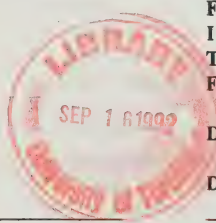
Décision n° : 945

This decision involves a bargaining unit review application, filed by the employer pursuant to section 18, in respect of its shopcraft employees. The shopcraft employees perform major and minor repairs and maintenance on the employer's freight cars and locomotives. The Board found that the existing situation, with employees organized along craft lines in six bargaining units, was no longer appropriate.

La présente décision fait suite à une demande de révision visant la structure des unités de négociation présentée par l'employeur relativement aux employés de métier d'atelier. Ces employés effectuent des réparations majeures et mineures et s'occupent de la maintenance des wagons et des locomotives. Le Conseil a conclu que la situation actuelle, soit le regroupement des employés à l'intérieur de six unités de négociation organisées selon les métiers, ne convient plus.

The Board noted the existence of a considerable overlap in the functions performed by the different crafts on the railway. In some shops employees in several crafts work in groups under the supervision of a supervisor who may or may not be a member of one of the crafts included in the working group. The Board noted that the employees have similar levels of training, similar working conditions and a common wage structure and concluded that there is a very substantial community of interest among

Le Conseil souligne le chevauchement considérable des tâches qui se rattachent aux divers métiers exercés dans le secteur ferroviaire. Dans certains ateliers, les employés de divers métiers travaillent ensemble sous la direction d'un superviseur qui peut ou non être membre du corps de métiers dont est constitué le groupe de travail. Le Conseil signale également que la formation, les conditions de travail et les régimes de rémunération des employés sont semblables, et qu'il existe une forte communauté d'intérêts parmi les employés



the employees covered by the application.

The Board also noted that, while the employer's evidence did not reveal any significant number of actual work jurisdiction disputes, the archaic craft rules which restrict work assignments continued to exist. Such rules would not likely be bargained away by the parties since their continuance is the justification for the existence of some of the bargaining agent organizations.

The Board concluded that the lateral mobility and thus the long-term job security of employees would likely increase if the bargaining unit were consolidated. One consolidated bargaining unit would also result in more effective and consistent collective agreement negotiation and administration.

The Board ruled that the establishment of two bargaining units among employees would not be in the long-term interest of employees. Nor would it assist in achieving sound collective bargaining and efficient collective agreement administration. The Board found to be appropriate for collective bargaining one bargaining unit consisting of all employees of Canadian National Railway Company employed in the Motive Power and Car Department and in the Station and Office Building Maintenance Department, Montréal, Québec, classified as Tradesperson, Apprentice and Helper, excluding all employees of the Canadian National Railway Company employed in the Central Station in Montréal, Québec, covered by a subsisting collective agreement between the Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees. The Board indicated that it would entertain submissions with respect to the selection of a bargaining agent to represent the consolidated bargaining unit.

visés par la demande.

En outre, bien que l'employeur n'ait pu faire la preuve qu'il existe, en réalité, un nombre significatif de conflits juridictionnels entre syndicats, les règles archaïques qui entravent la répartition des tâches perdurent. Il est improbable que la négociation mène à leur abolition, puisque leur existence justifie celle de certains agents négociateurs.

Le Conseil en est arrivé à la conclusion qu'une unité de négociation consolidée mènerait à une mobilité latérale accrue et qu'il en résulterait, à plus long terme, une meilleure sécurité d'emploi. Une telle unité élargie permettrait également d'assurer la négociation et l'application plus efficaces et plus cohérentes des conventions collectives.

Le Conseil a également déterminé qu'il ne serait pas dans l'intérêt des employés, à long terme, d'établir deux unités de négociation. Cela n'aiderait pas à créer de saines relations de travail ni à assurer l'application efficace des conventions collectives. Le Conseil a jugé habile à négocier collectivement une unité composée de tous les employés de la Compagnie des chemins de fer nationaux du Canada affectés au service des locomotives et des wagons ainsi qu'au service d'entretien des gares et des bureaux de Montréal (Québec) classés comme ouvriers, apprentis et aides, à l'exclusion de tous les employés de la Compagnie des chemins de fer nationaux du Canada travaillant à la Gare centrale de Montréal (Québec) qui sont assujettis à une convention collective en vigueur entre la Compagnie des chemins de fer nationaux du Canada et la Fraternité des préposés à l'entretien des voies. Le Conseil a indiqué qu'il accueillerait les arguments concernant la désignation d'un agent négociateur représentant l'unité de négociation élargie.

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Reasons for decision

Canadian National Railway
Company,

applicant,

National Automobile, Aerospace
and Agricultural Implement
Workers Union of Canada (CAW -
Canada); International
Brotherhood of Electrical
Workers; International
Association of Machinists and
Aerospace Workers; United
Association of Journeymen and
Apprentices of the Plumbing and
Pipe Fitting Industry of the
United States and Canada;
International Brotherhood of
Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers
and Helpers; Sheet Metal
Workers' International
Association,

respondent unions

Board File: 530-1850

The Board was composed of Mr. J.F.W. Weatherill,
Chairman, and Ms. Evelyn Bourassa and Mr. Robert Cadieux,
Members.

Appearances

Messrs. John Coleman and Alphonse Giard, Q.C., for
Canadian National Railway Company;

Mr. Steve Waller, for the Canadian Automobile Workers;

Mr. James L. Shields, for the International Association
of Machinists;

Mr. François Côté (after November 4, 1991, Mr. Frank
Klamph), for the International Brotherhood of Electrical
Workers;

Messrs. Michael Church and Abe Rosner for the
International Brotherhood of Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers and Helpers, the Sheet

Metal Workers International Association and the Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

Hearings on the merits of this matter were held at Montréal and Ottawa on January 25, February 12-15, February 19-22, April 15-18, April 30 - May 3, June 10-13, September 4-5, September 17-20, October 22-25, November 5, November 26-29, 1991.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This is an application filed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) to review the bargaining units currently established in respect of the shopcraft employees of the applicant employer. The Board heard very extensive evidence, going particularly to the company's alleged difficulties arising out of the fact that its shopcraft employees are represented by a number of organizations established on craft lines, and to the bargaining history of the parties, especially that relating to the period since the present units were established in 1986, as a result of this Board's decision in Canadian National Railway Company et al. (1986), 64 di 70 (CLRB No. 556).

I

In considering this evidence, and in assessing such matters as community of interest of employees, regard must be had to the basic factual context (as we view it) which underlies the situation.

The company's shopcraft employees are now divided into six bargaining units which are, with more or less precision, representative of the trades or crafts practised by the employees within those units or in respect of which such employees are apprentices or helpers. Persons employed as labourers or as clerical employees, although they may be employed at or in connection with the company's shops, are not covered by the present application, nor do we consider that they should be at this time.

It is clear from the evidence that there are many instances in which the skills used in the performance of particular tasks overlap between the craft groups involved in this application. At the time the application was made, each bargaining unit had as bargaining agent a craft union, these craft unions being among the oldest trade unions existing today. Such unions have been the bargaining agents for the employees in question, or their predecessors, for roughly a century. Over the years, as times and technology have changed, the number of bargaining units has diminished, and certain trade unions have merged with others, have ceased to represent railway workers or have simply disappeared. The number of persons employed in the various trades - in both relative and absolute terms - has changed considerably over the years, and the absolute numbers have declined - significantly - during the course of these hearings.

It is interesting to consider the relative sizes of these bargaining units. At the time of the officer's report in this matter they were as follows (these figures include both "active" and "inactive" employees):

<u>"Classifications</u>		<u>Number of</u> <u>Employees</u>
a)	<u>Brotherhood of Railway Carmen</u>	
	Carman	3244
	Lead Hand	129
	Helper	151
	Coach Cleaner	117
	Apprentice	<u>66</u>
		3707
b)	<u>International Association of Machinists</u>	
	Machinists	1664
	Lead Hand	70
	Helper	99
	Apprentice	<u>34</u>
		1867
c)	<u>International Brotherhood of Boilermakers</u>	
	Blacksmiths	412
	Lead Hand	10
	Helper	11
	Apprentices	<u>3</u>
		436
d)	<u>International Brotherhood of Electrical Workers</u>	
	Electrician	997
	Lead Hand	41
	Crane Operator	62
	Helper	29
	Apprentice	<u>55</u>
		1184
e)	<u>Association Plumbers & Pipefitters</u>	
	Plumber, Pipefitter	361
	Lead Hand	14
	Helper	2
	Apprentice	<u>1</u>
		378
f)	<u>Sheet Metal Workers</u>	
	Sheet Metal Workers	151
	Lead Hand	4
	Helper	<u>1</u>
		156"

To achieve journeyman status in each of these trades, an employee must conclude an apprenticeship programme (from time to time, equivalents have been established in terms of education and practical experience). In the case of the Canadian Automobile Workers - Rail Division (formerly the Brotherhood Railway Carmen of Canada), a shorter apprenticeship period has been developed. The Carmen's craft involves performance of the work of a number of trades which have evolved, in the railway context, as facets of the same general work.

Since this application was filed, the Brotherhood Railway Carmen of Canada merged with the Canadian Automobile Workers, which is an industrial and not a craft union. We shall refer to members of this bargaining unit as Carmen. The bargaining unit for which the CAW presently holds bargaining rights remains, of course, the same as that previously represented by the Brotherhood Railway Carmen.

The work performed by shopcraft employees may be very roughly divided into major and minor repairs and maintenance. Major repairs are carried out at main shops. At the time of this application, there were two main shops, located at Transcona, Manitoba and Pointe Saint-Charles, Québec. Somewhat less than half (2941) of the employees in the bargaining units in question worked at main shops. Repair and maintenance other than major repairs are carried out at line shops or line points (sometimes called running points), which vary greatly in size and relative complement from one union to another.

The more important line shops may be staffed with a mixture of members of the various unions involved (rarely the Plumbers and Pipefitters or the Sheet Metal Workers). The major union represented in line shops, however, is clearly the Carmen; as to the main shops, at Transcona the Carmen form the largest single group, being slightly more than one-third of the total work-force, whereas at Pointe Saint-Charles the IAM, again somewhat more than one-third, represent the largest single unit of employees. The main shops, however, are divided into car shops (in which the Carmen predominate), and diesel shops (in which there are very few Carmen). The larger line shops (Toronto, Montréal, Moncton, Edmonton and Winnipeg) have employees coming within most, but not necessarily all of the bargaining units involved. While the Carmen in each of these cases represent the largest number of employees, the division into car shops and diesel shops is usual. Apart from the 5 shops just referred to (each of which had over 450 employees), there are some 68 line shops or line points, 11 of which had more than 50 employees, and 27 of which had no more than 3. Very small line points are in most cases staffed by Carmen although in a few cases members of the IAM or the IBEW may be found.

Although there has been a reduction in employment since the time of filing of this application, the relative sizes of the various bargaining units and the distribution of work remain approximately the same from one union to another.

The only significant staffing pattern that appears from the evidence is that work on freight cars is for the most part performed by Carmen, while work on locomotives, not

surprisingly, involves a number of specialized crafts. Since motive power is now diesel-electric, the number of boilermakers and of plumbers and pipefitters has been greatly reduced from what it was many years ago. Boilermakers now essentially perform heavy metal fabrication. But since freight cars are now of steel construction, not of wood, the tasks of Carmen have also changed (although they continue to perform work involving a number of crafts), and Carmen, too, are frequently engaged in heavy metal fabrications as, from time to time, may be machinists and others.

II

There has, with time, been considerable blurring of the edges of the traditional crafts on the railways, and there is considerable overlapping of functions. The evidence is that to a very important extent, skilled tradesmen could, using their own tools, perform perhaps with some familiarization most - although certainly not all - of the tasks required to be performed in the company's shops. The craft unions have consistently opposed the notion of a "composite mechanic" classification, and the company asserts that it is not its present intention to develop such a classification. The company does, however, argue that in order to operate efficiently, it must have flexibility in assigning work, so that assignments may be made on the basis of ability and qualifications to perform tasks, unrestricted by what it considers to be the archaism of the "craft rules" set out in each of the collective agreements.

Two comments should be made on what has just been said. First, the craft rules and any restrictions on what might

otherwise be management's right to assign work are matters for collective bargaining, and such matters are now dealt with in the collective agreements. If the Board redefines the bargaining units in the manner sought in this application, that will not involve any determination with respect to assigning work. Second, there is no issue before us as to the requirement of accreditation within a craft for the performance of certain work. The assignment of work is, among other things, a function of skill and qualifications, and there is no doubt that for some work assignments to be properly made, the person to whom the work is assigned must be appropriately accredited within the appropriate craft. That requirement may simply arise from the nature of the work to be performed, or it may be imposed by law. This decision could not and does not deal with such matters.

Our concern is with the definition of a bargaining unit or units that will be appropriate for collective bargaining. The Board has recognized, however, that the goal is effective collective bargaining and that one aspect of such effectiveness - for the ultimate benefit of all concerned - is the ability of an enterprise to operate efficiently. Where a bargaining structure overemphasizes the institutional interests of the bargaining agents this goal may not, as a practical matter, be achievable. These are considerations which, in our view, may properly be borne in mind in determining what unit or units may be appropriate for collective bargaining in any particular situation.

The very general outline which we have given of the company's shopcraft operations shows that there are considerable variations in the surroundings in which

employees may work. A majority of the shopcraft employees work in what may be described as heavy industrial plants. Many, however, work in isolation or near isolation (relative to other shopcraft employees) and in a small-shop atmosphere. There is, generally, an observable distinction between work on locomotives and work on freight cars. To a certain degree, these distinctions of work place and, more importantly, of the nature of work are reflected in the memberships of the several bargaining agents.

While these factors are material to the question of community of interest, they are certainly not determinative of it, and in the instant case give no very clear indication of the appropriateness of any particular unit for collective bargaining purposes. The diversity of circumstances we have described is found, to a greater or lesser degree, with respect to each of the present bargaining agents. While it is true that Carmen constitute the principal element of the employment force in car shops, and that "the others" constitute the principal element of the employment force in diesel shops, this distinction relates principally to the larger installations where there is a clearly defined car shop and a clearly defined diesel shop. In such locations, Carmen may perhaps be perceived by some as a distinguishable group, but this observation does nothing to solve the problem of bargaining structures for the other employees, nor for Carmen working, as many do, at smaller points. For each of the crafts including the Carmen, given the nature of the work and the diversity of circumstances in which it is performed, the continued existence of a separate bargaining unit would appear anomalous.

Typically, where the size of operations at a given shop calls for it, employees in several crafts form working groups that report to a supervisor who may or may not be a member of one of the crafts included in the working group. Employees are not necessarily supervised by a member of their own craft. Plant facilities are not, in any significant way, exclusive to members of particular craft groups. While there are as many collective agreements as there are bargaining units, it is the case that all journeymen, whatever their craft, are entitled to the same rates of pay, and the same is true for helpers and apprentices.

It may be argued that what distinguishes one group of employees from another is the work performed and the craft skills and qualifications required to perform it. On the evidence, this distinction is more one of institutional adherence than of actual work performed. A substantial majority of the tasks actually performed could be performed by virtually any member of the skilled work-force. That is, "core craft skills" are used for a minority of the tasks required to be performed, although the extent to which this is so varies from one craft to another. We would repeat, however, that craft skills do remain essential to the employer's operations, and would add that nothing in the evidence suggests that a substantial requirement for persons fully qualified in various skilled trades will not continue. Both the work to be done and the craft skills required to do it have evolved and continue to evolve.

III

The company's rail operations are vast and complex, and the interrelationships of the various groups of employees necessarily involve many areas of unclear demarcation. It is possible nevertheless to recognize a number of distinct groupings where the employees' community of interest can be recognized and where, historically, collective bargaining patterns have reflected such distinctions. Thus, the "running trades" have been considered as a group - or groups - apart, as have clerical employees, maintenance of way employees and certain other more specialized groups. The shopcraft employees have long been recognized as having many features in common, one such feature no doubt being pride of craft. At one point, of course, the shopcraft employees were indeed included in a single bargaining unit, the bargaining agent for which was a council of shopcraft unions, which held a certificate from this Board. That certificate was revoked by the Board's decision in Canadian National Railway Company et al. (556), supra, and the fragmented unit, in its present form of several units, was established. As we said in an interlocutory decision in this matter Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845, the substantial issue in Canadian National Railway Company et al. (556), supra, was one of the viability of the council of trade unions. As we noted in decision no. 845, the present case raises, for the first time, the question of the continuing appropriateness (for this employment situation, at least) of certification on craft lines.

In Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 892, the Board dealt with a motion in the nature of a "non-suit" brought in the course of an application analogous to that now before this panel. The Board concluded as follows:

"We are of the view that it is appropriate to consider a change in the bargaining unit structure in the company's shops because while this structure has been altered considerably over the years, it has always retained its fundamental 'craft' character. Employees, naturally enough, organized on craft lines in the latter nineteenth century, long before the current notion of 'bargaining unit' had been formulated. Since that time there have been social, economic, organizational and technological changes which have revolutionized not only work and the workplace but also the workers themselves and their institutions. Of course, recognition that such changes have occurred does not require the conclusion that there should be any change in any particular grouping of employees or, as is the case here, in any particular bargaining unit. The recognition of fundamental contextual change, however, together with a consideration of the company's view of its bargaining and administration difficulties and, more importantly, those of the trade union representing the largest number of the employees concerned, lead us to conclude that it is proper at least to consider the appropriateness of the present bargaining units."

(pages 5-6)

The fragmentation which now characterizes the shopcraft group is not the result of a determination by the Board in favour of fragmentation as such. The Board's policy, very generally, may be said to be one in favour of broader-based collective bargaining. More important than any general policy considerations, however, is an assessment of the individual bargaining situation. Thus, in AirBC Limited (1990), 81 di 1; 13 CLRB (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), the Board recently revised a certificate that had been on "industrial" lines, issuing instead a series of certificates to separate

bargaining agents representing separate units of employees of that employer. In that case, however, the nature and circumstances of the work, skills and community of interest of the several groups of employees showed very clear differences which do not exist in the instant case.

In the instant case all of the craft employees in the bargaining units involved here perform tasks which come within the scope of traditional industrial craft work. The other employees in these units perform supporting functions with respect to such work. Variations in working conditions relate to the size and nature of the particular shop more than to craft affiliation. Employees are assigned to mixed working groups where appropriate, share common facilities, receive the same wages and benefits and are subject to collective agreements most of whose terms are identical. Indeed, for administrative purposes, their classifications are the same, all journeymen being classified as "Mechanical Tradesperson". The employees in question thus have similar levels of training, roughly similar working conditions and a common wage structure. Unsatisfactory as various suggested definitions of "community of interest" may be, it seems clear to us in this case at least that there is a very substantial community of interest among the employees covered by the application. In our view, it is no longer appropriate that such employees be organized in separate units for purposes of collective bargaining.

IV

There can be little doubt that if the application before us were one for initial certification, the Board would find that one bargaining unit would be appropriate for collective bargaining. Indeed, it would seem likely that such unit would be defined on industrial lines, rather than in terms of crafts, as we have indicated would in any event be the case here. Most - indeed, virtually all - large bargaining units in modern heavy industry include employees having craft qualifications in the same unit as unskilled and other workers. This is not, however, an application of that sort. As we have indicated, this application involves relationships and organizations which are deeply rooted in railroad history and to which we owe great respect.

While there is no specific presumption in favour of all-employee (or even "all craft employee") bargaining units (see Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726), pages 182-183), the Board has long favoured the larger, more comprehensive unit. In Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), the Board adopted an analysis of the relevant factors set out in the decision of the British Columbia Labour Relations Board in Insurance Corporation of British Columbia, [1974] 1 Can LRBR 403 (B.C.), pages 408-411. The factors there considered included the following:

- administration efficiency and convenience in bargaining;
- enhancement of lateral mobility of employees;

- facilitation of a common framework of employment conditions;
- increased industrial stability.

The importance of these factors was confirmed and additional related factors were discussed in the recent Canada Post Corporation case (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675), the additional factors including the following:

- overlap in the work performed by members of different bargaining units;
- common supervisory responsibility;
- operational contact between members of the various units;
- similarity of collective agreement provisions;
- the existence of work jurisdiction disputes.

With respect to each of these factors, a consideration of the facts of the present case favours the establishment of a single bargaining unit. The first four of those just mentioned have already been dealt with in these reasons. As to the last, work jurisdiction disputes, it must be said that the company's evidence in this matter did not reveal any significant number of actual disputes between unions in respect of jurisdiction. Although the development and application of the incidental work rule would appear to have reduced very considerably the number of wasteful occasions when the performance of core craft work would have to await the performance of a simple incidental function, such as the removal of a cover plate, by an employee coming within the scope of the appropriate craft rules, it nevertheless remains that the often archaic craft rules still exist and restrict work assignment. While it may theoretically be possible for

the parties to bargain these rules away, the real likelihood of this is slight, given that their continuance is the justification for the existence of certain of the bargaining agent organizations.

We have no doubt that, both as a general matter and in the particular circumstances of the railway shops, lateral mobility, and thus the long-term job security of employees, is more likely to increase where the bargaining unit is consolidated. As well, at both the local and national levels, the administration of a collective agreement has a better chance of being effective - and consistent - where a trade union's services can be provided in depth and from a larger resource base. The same is true of the negotiation process. It is true that the number of negotiations between the several parties has not, historically, been as great as the number of bargaining units would permit, but the potential for multiple negotiations is there, and the fact is that dual negotiations, with shifting alliances of bargaining agents, has been the rule in recent years. The company's expressed fear of "whipsawing" has not been justified historically. A more telling argument in favour of one unit, as far as negotiations are concerned, is, we think, the increased power and resources of the collectivity in the larger unit.

The Board was asked, by all trade unions except the CAW, to consider the possibility of establishing two bargaining units if we considered - as we do - that the status quo was not appropriate. One unit, it was suggested, would be a unit of Carmen, and the other a unit consisting of all the other crafts. Such a unit, in

our view, would be unlikely to satisfy any of the criteria we have just discussed. It would not give employees the broad resource base on which bargaining power resides; it would accentuate rivalry between groups of employees working together; it would do nothing to improve the consistency or efficiency of collective agreement administration. The only real justification for the establishment of two units among employees having substantial community of interest would appear to be the accommodation of the vested interests of existing organizations, not the long-term interests of employees nor the achievement of sound collective bargaining and efficient collective agreement administration.

In general, employee wishes are not a factor of importance in the determination of bargaining units. Given the historical context of the present bargaining unit structure however, and bearing in mind that a certain emotional attachment to the long-established and skill-focused organizations involved here might be expected, we think it noteworthy that although the present application was, in accordance with the Board's procedures, posted at the employer's shops throughout Canada, only two employee interventions were received. One was from the president of a local of the Brotherhood Railway Carmen, and appears to take a position contrary to that advanced by that union (now the CAW) in this case. In particular, objection is taken to "this application by the Employer to determine or have the Board determine what trade union I shall belong to." It is important to emphasize that neither the employer nor the Board may make such a determination. It is the role of the Board to decide what unit of employees is appropriate for collective bargaining. The trade union

which will be the bargaining agent for that unit will be chosen by the employees in the unit.

The other employee intervention was that of a union steward for a local of the IAM. His analysis of the situation, both actual and historical, is a lengthy and thoughtful one. We think it is helpful to set out the concluding paragraphs, which we find replete with common sense:

"An important issue for the railways is the issue of efficiency and the rational deployment of human resources. That is workrules and craft jurisdictions. The resolution of this issue to mutual satisfaction has been stymied up to now at least partly because of the fragmented structure of the rail unions. Railway employees see the issue primarily as one of job security. It is conceivable that some rationalization would be acceptable to them in return for significant safeguards in terms of job security and shared benefits from technological and operational changes. The unions while sharing these concerns also have to, in addition, view the issue as one of protecting their position and viability in terms of membership numbers. There is a concern among the membership as well that the merger of unions could lead inevitably to the end of craft distinctions with corresponding loss of status as skilled tradespersons and reduction of jobs. I share this concern of course. However, I am convinced that a strong united union is a better guarantee of protection for jobs and skills than mere organizational inertia embodied in a multiplicity of craft unions. At the same time a single union would be in a better position to make the type of trade-offs necessary if this issue is to be resolved.

There are many examples of large workplaces containing numerous classifications including different skilled trades which are well represented by one union. My own union represents aircraft mechanics and baggage handlers for the major airlines. Baggage handlers are not asked to fix jet engines and machinists don't load luggage; why should it be any different on the railway. In conclusion I submit that the Canada Labour Relations Board could best fulfil its mandate in this case by ordering as soon as practicable a vote among the shopcraft members as to which single union they wish to represent them. This resolution would best serve the interests of employees of the

Canadian National Railway and the public interest as well.

It should be noted that such a decision is already anticipated by the affected employees and their unions. Lines are already being drawn between union leaders and members as to which of the larger unions they plan to support if and when a vote is called. A lengthy delay would harm the generally harmonious relations that prevail between unions at the local level at least. A prolongation could also be deleterious toward harmonious labour relations on the railway in general as issues that affect more than one union become difficult to settle in the atmosphere of uncertainty."

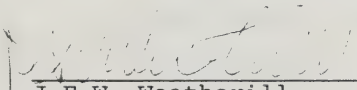
We agree with these views, and would repeat that while we have the greatest respect for the collective bargaining relationships that have developed in the railway industry over the past century or more, we consider that it is a set of relationships that must continue to develop and evolve, and there is no reason not to think that most employees recognize that.

Having regard to all of the foregoing and to the evidence set out at the hearing and in the officer's report (save where the latter has been the subject of viva voce evidence), the Board finds the following unit of employees to be appropriate for collective bargaining:

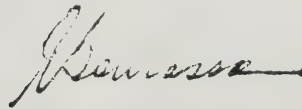
"All employees of Canadian National Railway Company employed in the Motive Power and Car Department and in the Station and Office Building Maintenance Department, Montréal, Québec, classified as Tradesperson, Apprentice and Helper, excluding all employees of the Canadian National Railway Company employed in the Central Station in Montréal, Québec, covered by a subsisting collective agreement between the Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees."

There remains to be decided the matter of the bargaining agent entitled to represent the employees in this bargaining unit. In its reply to the application, the

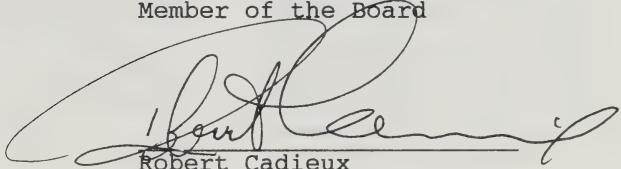
Canadian Automobile Workers applied for certification, in the event such a unit were determined to be appropriate. The Board will entertain any other submissions with respect to the matter of representation which may be filed with it before the close of business on July 31, 1992.



J.F.W. Weatherill
Chairman



Evelyn Bourassa
Member of the Board



Robert Cadieux
Member of the Board

ISSUED AT OTTAWA, this 10th day of July 1992.

information

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SUMMARY

VIA RAIL CANADA INC., APPLICANT,
INTERNATIONAL BROTHERHOOD OF
LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION,
RESPONDENTS.

Board File: 530-1953

Decision No.: 946

This decision deals with a number of preliminary objections raised by the respondent trade unions with respect to a section 18 application by the employer, VIA Rail Canada Inc., in which it sought review of certification orders certifying the bargaining agents to represent, in different bargaining units, its "running trades" employees. The employer requested consolidation of the bargaining units representing its "running trades" employees from two units into one.

The Board dismissed a number of objections which challenged the Board's jurisdiction to entertain the review application on the basis, among others, that the review application affects representation rights and interferes with freedom of association. The Board dismissed these objections for the reasons given in Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845 and in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 866.

The Board also dismissed an objection that there do not exist any "current certification orders" in respect of employees of the employer represented by the present respondents, and that accordingly, there is nothing to be reviewed pursuant to section 18 of the Canada Labour Code. The Board held that there had been sales of businesses, or parts of businesses, within the meaning of sections 44 and 45 of the Code, from Canadian National and Canadian Pacific to VIA. The bargaining rights of the respondent trade unions flow from certificates issued by the Board in respect of these predecessor employers of employees of the applicant VIA Rail. The Board concluded that it had jurisdiction to

RÉSUMÉ

VIA RAIL CANADA INC.,
REQUÉRANTE, FRATERNITÉ
INTERNATIONALE DES INGÉNIEURS
DE LOCOMOTIVES ET TRAVAILLEURS
UNIS DES TRANSPORTS, INTIMÉS.

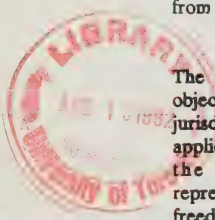
Dossier du Conseil : 530-1953

Décision n° : 946

La présente décision traite d'un certain nombre d'objections préliminaires que les syndicats intimés ont soulevées relativement à une demande de révision présentée par VIA Rail en vertu de l'article 18 du Code. Cette demande visait à modifier les certificats d'accréditation des agents négociateurs qui représentent, au sein de diverses unités, le personnel de l'employeur chargé du matériel roulant. L'employeur demandait que soient fusionnées en une seule unité les deux unités regroupant ces employés.

Le Conseil a rejeté un certain nombre d'objections concernant sa compétence pour entendre la demande de révision, au motif, notamment, que la demande touche les droits de représentation et la liberté d'association. Le Conseil a rejeté ces objections en se fondant sur les motifs énoncés dans Compagnie des chemins de fer nationaux du Canada (1991), décision du CCRT n° 845, non encore rapportée, et Canadien Pacifique Limitée (1991), décision du CCRT n° 866, non encore rapportée.

Le Conseil a également rejeté l'objection selon laquelle il n'existe aucun certificat d'accréditation en vigueur à l'égard des employés de l'employeur que représentent les intimés en l'instance et que par conséquent, il n'y a rien à réviser aux termes de l'article 18 du Code canadien du travail. Le Conseil a conclu qu'il y avait eu ventes d'entreprises ou de parties d'entreprises aux termes des articles 44 et 45 du Code, entre Canadien national et Canadien Pacifique, d'une part et VIA Rail d'autre part. Les droits de négociation des syndicats intimés découlent de certificats que le Conseil a délivrés aux employeurs prédécesseurs des employés de VIA Rail. Le Conseil a conclu qu'il était compétent



review the order or orders which created those bargaining rights and defined the bargaining units with respect to which they could be exercised and dismissed the objection.

pour réviser la ou les ordonnances ayant mené à la création des droits de négociation et défini les unités de négociation auxquelles ces droits s'appliquent, et il a rejeté cette objection.

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Reasons for decision

VIA Rail Canada Inc.,

applicant,

International Brotherhood of
Locomotive Engineers and United
Transportation Union,

respondents.

Board File: 530-1953

The Board was composed of Mr. J.F.W. Weatherill, Chairman, Mr. J. Philippe Morneau, Vice-Chairman and Ms. Mary Rozenberg, Member of the Board.

Appearances

Ms. Anne Cartier, for VIA Rail Canada Inc. (VIA).

Mr. James Shields, for the Brotherhood of Locomotive Engineers (BLE).

Mr. Harold Caley, for the United Transportation Union (UTU).

A hearing on preliminary objections was held in this matter at Montréal on April 8, 1992. Written submissions were subsequently received dated April 10, April 13 and April 16, 1992.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This is an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations). The applicant states the purpose of the application to be as follows:

"The Applicant requests the Canada Labour Relations Board to review the current certification orders certifying the bargaining agents to represent, in different bargaining units, its running trades employees (BLE and UTU), so as to consolidate all of these bargaining units into one."

The respondents raised a number of preliminary objections to the application. Many of these are the same as the preliminary objections which were raised and dismissed in the Canadian National Railway Company (1991), as yet unreported CLRB decision no. 845. Similar objections were raised and were dismissed in Canadian Pacific Limited (1991), as yet unreported CLRB decision no. 866. The parties were content that the Board accept as given the objections and arguments made in those cases. We have done so, and are of the view that those objections, which challenge the Board's jurisdiction to entertain this application on the basis (among others) that it affects representation rights and interferes with freedom of association, should be dismissed, for the reasons given in the decisions just cited.

The second general ground of objection, which was thoroughly argued, is that there do not exist any "current certification orders" in respect of employees of the employer represented by the present respondents, and that accordingly, there is nothing to be reviewed pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations).

Section 18 of the Code, on which the applicant relies, provides as follows:

"The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The objection is based on the fact, and it is a fact, that there is no "order or decision" of the Board establishing bargaining units or affecting bargaining rights between the applicant VIA Rail and either of the

respondents in respect of employees of the applicant. There is, it is argued, nothing to be reviewed, rescinded, amended, altered or varied.

There would appear to be no doubt, and this is implicitly admitted by the parties, that VIA Rail is, with respect to the operation of its rolling stock, the "successor" or the partial successor to the Canadian National and Canadian Pacific railways, although no determination in that respect has until now been made by this Board. The BLE and the UTU had been certified as bargaining agents for units of employees of Canadian National and Canadian Pacific, and they continue to be so. When VIA Rail began the operation of rolling stock on its own account, it hired engineers, conductors and trainmen, in accordance with various agreements, from Canadian National and Canadian Pacific. It "voluntarily recognized" the BLE and the UTU as bargaining agents of engineers and of conductors and trainmen respectively, and it entered into collective agreements with these unions in respect of employees in these classifications. As we have noted, these unions have not been certified by the Board in respect of employees of the applicant, VIA Rail.

The respondents argue, then, that there is no order or decision of the Board which could appropriately be reviewed in these circumstances. The applicant argues that since it is - and the respondents do not deny this - the successor employer within the meaning of the Code, it is subject to the bargaining rights which continue to exist in respect of the former employees (now employees of VIA Rail), of the predecessor employers, by virtue of the operation of the Code. The material provisions of the Code are in sections 44 and 45 thereof, and are as

follows:

"44. (2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees ... may ... be certified ... as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending ...

45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,

(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;

(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and

(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.

(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.

(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from that date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable."

These provisions were considered by the Board in Halifax Grain Elevator Limited (1991), 91 CLLC 16,033 (CLRB decision no. 867), the circumstances being in some respects quite analogous to those of the instant case. That case involved an application for certification. The applicant trade union, the International Longshoremen's Association, had been certified in 1958 for a group of grain elevator employees working for the Halifax Port Corporation. In 1985, the Port leased the elevator to Halifax Grain Elevator Limited. (HGEL), which took over the operation. All the elevator employees moved on to Halifax Grain Elevator. The Port's certification was never amended. No application seeking a declaration of sale of business was filed, and Halifax Grain Elevator "voluntarily recognized" the union. In 1990, the same union applied to be certified at Halifax Grain Elevator for the same employee group. The Board dismissed the application as redundant and moot. The Board went on to consider, pursuant to section 18 of the Code, the definition of the bargaining unit in question, although no certificate had been issued in respect of the employees of Halifax Grain Elevator Limited, which the Board, on its own motion, found to be a successor employer to the Halifax Port Corporation.

In Halifax Grain Elevator Limited, supra the Board stated that:

"... The Board cannot ignore nor the parties escape the consequences of a sale of business when the evidence establishes that a sale has occurred."

(page 8)

and further that:

"What this all boils down to is that the ILA's view that it is merely voluntarily recognized is erroneous. The fact of the matter is that under the Code, it is already certified and HGEL already bound by the certification ..."

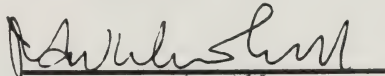
(page 10)


In the instant case, the respondent trade unions' bargaining rights flow from certificates issued by this Board in respect of predecessor employers of employees of the applicant VIA Rail. It is clear in this case too that there were sales of businesses - or parts of businesses - within the meaning of the Code from Canadian National and Canadian Pacific to VIA, and that the trade unions who held bargaining rights in respect of employees of Canadian National and Canadian Pacific continued to hold bargaining rights in respect of those employees when they transferred to VIA. All of the tests with respect to sale of business are met, and the Board finds accordingly.

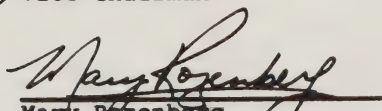
The Board's decision in the Canada Transport Group Ltd. (1989), 78 di 174; and 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRBR no. 759), is not inconsistent with what is said here. In that case, the Board dismissed an application for review under section 18, holding that it had no authority over voluntarily recognized bargaining units. In that case, the employer's business was the result of the amalgamation of a number of enterprises. The majority of the employees of the predecessor

employers had not been organized. The circumstances were not ones in which bargaining rights could be said to have continued by virtue of the Code. The real source of the bargaining rights which existed at the time of the application was the voluntary recognition extended by the new employer. In the instant case, however, the real source of bargaining rights is the certificate or certificates issued by this Board to predecessor employers. Whatever the intention of the parties to the "voluntary recognition" may have been, the real effect of it was that of an acknowledgment that the bargaining rights continued. In these circumstances the Board does, we find, have jurisdiction to review the order or orders which created those bargaining rights and defined the bargaining units with respect to which they could be exercised.

For the foregoing reasons, the latter objection, like the others, is dismissed. The Board finds that it does have jurisdiction to consider the application before it. The parties will be advised of the date and place at which the matter will be heard on the merits.


J.F.W. Weatherill
Chairman


J. Philippe Morneau
Vice-Chairman


Mary Rozenberg
Member of the Board

DATED AT OTTAWA, this 17 th day of July, 1992.

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Summary

WILLIAM E. JOHNSON, COMPLAINANT,
ASSISTED BY GENERAL TRUCK DRIVERS
AND HELPERS LOCAL UNION 31, AND
LYNDEN LOGISTICS INC., DOING
BUSINESS AS GATEWAY TRANSPORT,
RESPONDENT EMPLOYER.

Board File No. 745-4194

Decision No.: 947

Résumé de Décision

WILLIAM E. JOHNSON, PLAIGNANT, AIDÉ
DE LA SECTION LOCALE 31 DU SYNDICAT
DES TEAMSTERS (GENERAL TRUCK
DRIVERS AND HELPERS), ET LYNDEN
LOGISTICS INC., EXPLOITÉ SOUS LA
RAISON SOCIALE GATEWAY TRANSPORT,
EMPLOYEUR INTIMÉ.

Dossier du Conseil n° 745-4194

No de Décision: 947

A truck driver who was the union
steward and a member of the
bargaining committee for a unit of
employees of Gateway Transport,
Watson Lake, Yukon, who are
represented by the Teamsters Union,
was dismissed on March 10, 1992.

After a hearing in Watson Lake on
June 2, 3 and 4, 1992, the Board
concluded that his firing had been
motivated in part by management's
desire to be rid of a prominent
union supporter and that this was
contrary to section 94(3)(a)(i) and
96 of the Canada Labour Code (Part
I - Industrial Relations).

The Board ordered the employer to
cease violating the Code, to
reinstate the fired employee and to
compensate him for lost wages.

Un conducteur de camion qui était
délégué syndical et membre du
comité de négociation à l'égard
d'une unité d'employés de Gateway
Transport, Watson Lake (Yukon),
représentés par le syndicat des
Teamsters, a été congédié le
10 mars 1992.

Après la tenue d'une audience à
Watson Lake les 2, 3 et 4 juin
1992, le Conseil a conclu que le
congétiement était motivé en partie
par le désir de la gestion de se
débarrasser d'un militant syndical
bien en vue et qu'il violait le
sous-alinéa 94(3)a)(i) et l'article
96 du Code canadien des relations
du travail (Partie I - Relations du
travail).

Le Conseil a ordonné à l'employeur
de cesser d'enfreindre le Code, de
réintégrer l'employé congédié et de
l'indemniser pour le salaire qu'il
avait perdu.



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Reasons for decision

William E. Johnson,
complainant,
*assisted by General Truck
Drivers and Helpers Local
Union 31,*
and
*Lynden Logistics Inc.,
doing business as Gateway
Transport,*
respondent employer.

Board File: 745-4194

The Board was composed of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Mary Rozenberg.

Appearances

Ed Horembala, for complainant William E. Johnson and General Truck Drivers and Helpers Local Union 31; and Larry Page, for the respondent employer.

These reasons for decision were written by Vice-Chairman Eberlee.

I

William E. Johnson was a truck driver for Lynden Logistics Inc., doing business as Gateway Transport (Gateway) until he was fired on March 10, 1992. The union filed a complaint on his behalf on March 25, 1992, alleging that the dismissal had occurred "in part due to the fact he helped organize Gateway Transport, was a shop steward and sat at the bargaining table. After that time there seemed to be a vendetta to get Mr. Johnson for his union

activities." The union claimed that the firing constituted a violation of sections 94(3)(a)(i) and 96 of the Canada Labour Code (Part I - Industrial Relations) which read as follows:

94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

The Board held a hearing in Watson Lake, Yukon on June 2, 3 and 4, 1992.

II

Gateway Transport is in the business of transporting lead and zinc concentrate from a Curragh Resources' mine, some 71 kilometres north of Watson Lake, to an ore terminal at the ocean port of Skagway, Alaska. The company employs 38 drivers who operate a fleet of 15 specially designed vehicles, which are 83 feet long and each carry 48 tons of ore. Mr. Johnson was one of these drivers. The run from Watson Lake to Skagway is scheduled to be completed within

12 hours in winter and 11 hours in the summer. Actual driving time is considered to be 9 1/2 hours, with the remaining time being used for rest and refreshment breaks.

Having arrived in Skagway from Watson Lake, and having left the ore concentrate at the ocean terminal, a driver is entitled to a lay-over of at least four hours, and he may decide to take as many as eight hours at a minimum, before either picking up the vehicle from an arriving driver at the terminal or taking over a vehicle that has been parked at a location just outside Skagway and returning it to Watson Lake.

Gateway Transport has contracted with the Gold Rush Lodge in downtown Skagway to provide rooms for the drivers' lay overs and transportation to and from the parking location of the trucks. It also keeps records of driver arrivals and departures and generally monitors their condition on behalf of the management. The person who actually carries out the responsibilities contracted to the Gold Rush Lodge is its owner and operator, Harry Bricker, or, in his absence, a member of his staff or of his family.

The mine began operations in August 1991. Since its own storage space holds only seven truckloads, the vehicles operated by Gateway must be on the road on a regular, around-the-clock basis to ensure that production does not build up too large a backlog of concentrate at the mine site. Ideally, Gateway carries 12 loads a day to Skagway. They try to keep trucks about two hours apart. A driver at the top of the list is dispatched to make a round trip between Watson Lake and Skagway. When he returns to Watson Lake, he goes to the bottom of the driver list, then works

his way up until he is assigned to another trip. After three trips he takes 24 hours off.

Drivers are closely monitored in order to ensure that the company can maximize the productivity of the vehicle fleet and maintain the daily 12 load standard. Among various things that the company keeps close track of is the ability of individual drivers to get the most mileage possible out of a vehicle's fuel consumption. Each vehicle is equipped with a device that records its complete operation on a round trip - speed, gear-shifting, stops and so forth. The Board was told by the company's general manager, Lloyd Bjork that the Gold Rush Lodge in Skagway is management's agent for Gateway Transport at the Skagway end of the transportation system. The lodge is an extension of their dispatch and management system.

At the hearing, the company justified its dismissal of Mr. Johnson by claiming that he had engaged in insubordinate behaviour on more than one occasion, particularly vis-à-vis Mr. Bricker, the Gold Rush Lodge operator. He had also allegedly refused to follow dispatch and other company rules. The culminating incident, so to speak, was a dispute he was said to have had with Mr. Bricker which resulted in the latter barring him from using the lodge.

III

Mr. Johnson played a role in the organization of the union. An application for certification was filed by the Teamsters Union on October 24, 1991 and a certification order was issued by the Board on January 24, 1992. Mr. Johnson was

elected the union's shop steward in January 1992. He was a member of the union negotiating team from the outset of negotiations for a first collective agreement.

At this point, another actor in the drama needs to be introduced. He is Al Evans, now a driver, but between November 29, 1991 and the end of April 1992, a supervisor and dispatcher and thus a member of management. Mr. Evans, while still a driver in October and November 1991, was opposed to the Teamsters' application. A few days before he became a member of management, he prepared a petition, signed it first and obtained the signatures of other drivers. It was then forwarded by somebody else (because he was now a member of management) to the Board's office in Vancouver. The petition called for a representation vote. There was no vote because the application was accompanied by evidence which clearly showed the Teamsters were supported by a substantial majority of the drivers.

In testimony before the Board, however, Mr. Evans conceded that his sentiments went well beyond merely desiring a vote. He admitted that he told another driver, Al Gioia, that he would do anything he could to keep the union out, largely because of his dislike for its Yukon business representative. His view was that if the union were certified things around the company would be thoroughly messed up. (His wording was more profane.) He told the Board he continued to hold these views and to express them to employees whom he supervised after he became a dispatcher. He continued to urge employees not to support the union. His anti-union animus and what he thought should happen to the union was no secret to anybody.

Mr. Evans had a close relationship with Lloyd Bjork, Gateway's general manager. He was Mr. Bjork's friend and next-door neighbour. He had done a lot of work on Mr. Bjork's house. His wife is Mr. Bjork's secretary. It seems probable that even if his promotion to the dispatcher's position on November 29, 1991 was not a reward for his anti-union stance, it would have been taken as such by many of the drivers and would have been interpreted as representing an anti-union policy on the part of the company.

The Board was not told why Mr. Evans had ceased to be a dispatcher in April. There was, however, no sign that this had occurred because of any falling-out between him and Mr. Bjork or the company. Indeed, at the hearing he appeared to be totally co-operative with the company in its effort to defend itself against the union's claims. The Board doubts that Mr. Evans, while a member of management, was simply one individual voicing his own sentiments and an anti-union course of action on employees. He was undoubtedly giving voice to a policy shared by his friend, general manager Bjork, and by the management generally.

Mr. Johnson was considered a good employee until his working world collapsed between March 4 and 10 and he was put on the street. On March 4, he was in Watson Lake, having returned a day or so earlier from a trip to Skagway. He had been advised that he would be taking a load to Skagway and leaving around noon. He slept until about 10:00 a.m., expecting a call to be ready to go out in an hour or so. But no call came until almost 12 hours later.

When he arrived at the Gateway terminal, about 10:00 p.m.,

he was not in a good mood. He was angry because he felt the order in which the drivers were normally called had been disturbed, and he had been set back 10 or 12 hours, due to the fact that dispatcher Dean Dunbar had been assigned to take a load. As it turned out, Mr. Johnson's understanding of the reason for the delay in calling him was imperfect, but at the time he felt he had a valid complaint. Moreover, he had been up for 12 hours, waiting for his call and now was expected to be awake on the road for another 12 hours - the space of time allowed by the company's system for getting a load from Watson Lake to Skagway.

After much struggle during the course of cross-examination by the union's counsel, Mr. Bjork finally conceded it was probably somewhat hard on a driver to be told to be ready for a noon load and then to end up with the prospect of having to be awake and alert for 24 hours. The fact that Mr. Johnson was in a sour mood when he went into the terminal to get his load and encountered dispatcher Al Evans is hardly to be wondered at. What is to be wondered at is the fact Mr. Evans felt compelled to record on a "supervisor report" that Mr. Johnson was annoyed, used some colourful Yukon profanity and warned that he might not make it to Skagway within the prescribed 12 hours. This report went to Mr. Bjork.

As it turned out, Mr. Johnson did not arrive in Skagway until some 16 hours later. He had to stop on the way and sleep in his truck for a few hours. Then he had problems with the truck. According to a supervisor report filled in by Cliff Kostiuik, the chief dispatcher, "0645 Bill called in to say that he was going again and to inform us that

maybe the drivers should idle the trucks up to 1200 when they stop, as his fuel jelled on him when he stopped and slept for a few hours. I told him that we had presumed that the drivers would know that when it was cold and since we are using summer fuel they would automatically idle the trucks up to keep them warm. Bill replied that since he was such a dummy he did not know and slammed the phone down."

Mr. Johnson's complaint that night about the assignment of dispatcher Dean Dunbar disrupting the regular dispatch system appears to the Board to have prompted unusual attention. In what undoubtedly took a considerable amount of time, dispatcher Kostiuk prepared a lengthy and detailed refutation of Mr. Johnson's complaint. It, along with Mr. Evans' supervisor's report and Mr. Kostiuk's report on Mr. Johnson's fuel problem, was put before general manager Bjork later on March 5. This prompts the Board to feel that there was somewhat of a concerted effort to show Mr. Johnson in the worst possible light in respect of what he had said and/or done during the night of March 4 to 5. To the unbiased outsider, Mr. Johnson's behaviour does not appear to be too far out of line or too surprising considering the circumstances. What is surprising is the insensitivity of the response to his situation, on the one hand, and the sensitivity to his use of robust language, on the other.

Mr. Johnson arrived in Skagway late in the afternoon of March 5. He reported his arrival by radio to Mr. Bricker of the Gold Rush Lodge. After unloading and refuelling the truck at the waterfront terminal, he radioed Mr. Bricker again, as was the practice. The latter directed him to

drive the truck to the location on the outskirts of Skagway where the company had a parking place for vehicles which were to be taken back to Watson Lake by a relieving driver. Mr. Bricker advised him that a car (a Subaru), that was used to shuttle drivers to and from the Gold Rush Lodge was parked at this location and he should bring it back to the Lodge.

Mr. Johnson asked Mr. Bricker when the next driver was going out and if the Subaru was needed right away. Mr. Bricker testified that he told Mr. Johnson that another driver would need the Subaru to go out to the truck in 30 minutes. Mr. Johnson testified that Mr. Bricker said 60 minutes, not 30 minutes.

The Board prefers Mr. Johnson's version. Under cross-examination by the union's counsel, Mr. Bricker conceded that the other driver was then still asleep and was not due to be awakened for another 45 minutes; the records filed by the company at the hearing also bear this out. Mr. Johnson's version thus makes more sense than Mr. Bricker's.

Mr. Johnson told Mr. Bricker that he would wait at the truck parking location for another driver who had been a few minutes behind him and this would save Mr. Bricker a separate trip out in the Subaru just to pick him up.

This driver, Mr. Johnson and the Subaru did not turn up when expected, so Mr. Bricker loaded the relieving driver into another vehicle and, as he drove past a restaurant, he noted the Subaru parked outside. According to Mr. Bricker, this was more than an hour after he had spoken to

Mr. Johnson.

Mr. Bricker entered the restaurant and found Mr. Johnson and the other gentleman eating. After some words between them, Mr. Bricker continued on with the relieving driver to the truck parking location. The result, however, according to Mr. Bricker, was that this driver left Skagway later than he should have.

Back at the Gold Rush Lodge, Mr. Bricker reprimanded Mr. Johnson, telling him the Subaru was not for personal use without permission. Mr. Johnson had thought he had such permission. Mr. Bricker testified that Mr. Johnson reacted angrily and was very loud. Mr. Johnson testified that Mr. Bricker was very loud. It seems certain, however, that Mr. Johnson told Mr Bricker what to do with the Subaru and that he was not going to drive it again, that he would expect henceforth to be shuttled by Mr. Bricker or one of his employees.

Mr. Bricker telephoned the Gateway dispatch office in Watson Lake and reported on Mr. Johnson's conduct, stating that he would not tolerate this sort of behaviour on the latter's part, according to the dispatcher's record of the conversation. The dispatcher he spoke to was Al Evans who wrote up another supervisor report and passed it to Mr. Bjork. On March 6, he called Watson Lake again and talked to the general manager; he allegedly told Mr. Bjork he would have to "get a handle on this" because otherwise Mr. Johnson would not be welcome at the Lodge.

Mr. Johnson returned to Watson Lake and on March 6 was called into Mr. Bjork's office. Mr. Bjork showed him the

various supervisor reports that had accumulated on his desk and raised the matter about which Mr. Bricker had complained. Mr. Johnson explained his side of the story and complained about drivers not being dispatched in proper order. Mr. Johnson testified that he told Mr. Bjork if it were not for the deficiencies of the dispatch system, the company would not be unionized.

Mr. Johnson testified that Mr. Bjork suggested he (Johnson) was heavily involved in getting the union into the company. Mr. Bjork denied saying this.

However, the two did not dispute that Mr. Johnson went on to say that the company should be happy it was he (Johnson) who was involved and not "some radical" who might talk the other drivers into asking for 80 cents a mile. Nor did they dispute that Mr. Bjork replied to the effect that if the drivers made a demand like that they would all be out of a job because the mine would not continue with such a costly contract.

Taking into account that the two were largely in agreement as to what was said and that Mr. Johnson's version of the area of disagreement makes sense in the overall context, it seems probable to the Board that Mr. Johnson's description of the exchange is the more accurate.

Mr. Johnson testified that after complaining to Mr. Bjork about missing out on trips, he told Mr. Bjork they were going to go to the labour board if this happened again. According to Mr. Johnson, Mr. Bjork's response was that now Mr. Johnson had angered him; there would be no verbal warning; he would receive a written warning. Mr. Bjork

admitted that Mr. Johnson had referred to allegedly missing trips and had mentioned going to the labour board, but he denied saying this had made him angry, and so on. On balance, the Board believes Mr. Johnson's version of the conversation. Mr. Bjork went on to issue the following to Mr. Johnson:

"March 6, 1992

Mr. William Johnson
2190B Second Avenue
Whitehorse, Yukon Y1A 1C7

Re: 1030 Hours - Conversation with William (Bill)
Johnson

Bill:

This letter is a written warning for the following actions. This letter will remain in your employee file for one(1) year in case there are further occurrences.

- 1) Failure to follow dispatch instructions and company policy pertaining to going to work ready to work. (Not drive 1/2 hour, stop 1/2 hour, drive 2 hours, sleep 4 hours and 12 minutes).
- 2) Disrupting dispatch procedures in Skagway and insubordination (basically arguing with Hotel Owner/Contractor for Gateway Transport).
- 3) Using profane language with Dispatch on departing from Terminal

Documentation is on file to substantiate this letter.

Sincerely,

GATEWAY TRANSPORT

Lloyd Bjork
General Manager

cc: Employee's Personal File

LB/te"

On March 8, Mr. Johnson drove a load of concentrate to Skagway. He went through the usual procedure of radioing to Mr. Bricker at the Gold Rush Lodge. After he had

refuelled at the waterfront terminal and had radioed again, Mr. Bricker told him to wait for a pick up, that his relieving driver would be right over. This driver, John Brown, arrived a few minutes late in the Subaru. True to his determination not to drive the Subaru after his earlier contretemps with Mr. Bricker, Mr. Johnson left the Subaru at the terminal, hitched a ride through Skagway with Mr. Brown in the truck to a point near the lodge and walked the rest of the way to it.

He reported in to Mr. Bricker, who wrote down the requisite statistics on the forms that were kept for this purpose. While standing and talking to Mr. Bricker, he noticed a ring binder on a table next to him which set out drivers' schedules. According to Mr. Johnson, he saw the name of another driver and complained to Mr. Bricker that this driver was listed to drive from Skagway to Watson Lake ahead of schedule. An argument then developed between the two of them. Mr. Bricker reported this episode by telephone to dispatcher Al Evans in Watson Lake. Mr. Evans' supervisor report to general manager Bjork related the incident as follows: "Bill caught a ride with John Brown from fuel rack where he left the Subaru. He told Harry he won't drive the Subaru. He also came unglued after snooping thru Harry's papers and finding that Roger Kay was coming back on line yelled at Harry and Harry's thru with him. He can stay where ever he wants but Harry doesn't want Bill to call him." [sic]

The Board was told that the "papers" through which Mr. Johnson was allegedly "snooping" are Mr. Bricker's ongoing schedule for drivers' arrivals and departures and have normally been open to any driver to peruse.

When Mr. Johnson arrived back in Watson Lake, he got into additional trouble with his supervisors. It was alleged that he failed to do a "post-trip" check-up of his vehicle. This involved ensuring that all lights were working, that fluid levels were where they should be, that the cab was clean and that generally the vehicle appeared to be in good condition.

Mr. Johnson testified that he did in fact check the lights. It was dark when he arrived back and he drove into the terminal with the lights on; he observed that they were working. He did not check the oil because he was aware that the truck was going to be serviced immediately and the oil would be checked by the mechanic, so there was no point in his doing this as well. He testified that the cab was not dirty and did not require to be cleaned out. (In the absence of any evidence to the contrary, we accept this assessment about the condition of the cab.) He told the Board that he walked around the vehicle and visually checked the tires, the locks on the large pots that carry the concentrate and so forth.

It seems that this "trouble" over whether he did or did not do a post-trip check arose by accident. Dan Leas, a mechanic, testified that Mr. Johnson brought the truck into the terminal; he (Johnson) was in a bad mood. Mr. Leas did not notice Mr. Johnson cleaning up the cab; he also did not see him checking the lights. He did see him do a visual check of the vehicle itself. Mr. Johnson told him that he would not test the oil because Mr. Leas was going to service the vehicle in any case. Mr. Leas testified that this made sense and was not a problem as far as he was concerned. The "accident" occurred when dispatcher Dean

Dunbar happened to come by and Mr. Leas, referring to Mr. Johnson's apparent bad mood, asked him what was wrong with Bill Johnson. The upshot of that chance encounter was that Mr. Leas told Mr. Dunbar what had gone on and what he had seen and not seen. Mr. Leas testified that as far as he was concerned the episode was "no big deal" and the whole matter would not have come up if Mr. Dunbar had not happened to walk past him.

It will be recalled that Mr. Dunbar was the dispatcher who took a load to Skagway around March 3 or 4, a matter about which Mr. Johnson had complained. Mr. Dunbar did nothing to get Mr. Johnson's side of this latest story and filed a supervisor report for the attention of general manager Bjork which said:

"Bill Johnson didn't clean truck #14 on arrival from Skagway or post trip other than check pot locks and tires. He told mechanics that they were doing a service anyway so he didn't have to. All drivers are to post trip trucks regardless as well as clean the cabs and windows for the next driver." [sic]

Mr. Bjork talked twice to Mr. Johnson about his latest alleged shortcomings. One of the major issues in the first conversation was that Mr. Bjork thought Mr. Bricker had said Mr. Johnson could no longer stay at the Gold Rush Lodge. Mr. Johnson maintained, on the other hand, that as a result of a conversation he had had with Mr. Bricker, the two had more or less made up. The result of this conversation was that Mr. Bjork simply suspended Mr. Johnson while he could check the point out with Mr. Bricker.

Later, they had a second conversation. On March 10,

matters came to a head. Mr. Bjork testified that he decided to fire Mr. Johnson for continued "abuse of the situation."

He wrote down his rationale and gave it to Mr. Johnson:

"08 March. Didn't do post trip told mech. that they were doing a service anyway. [As we have already noted, this claim by Mr. Bjork was largely inaccurate].

10 March [the evidence suggests this was actually 08 March] confrontation with Harry at Gold Rush for the third time twice in 4 days not allowed to stay at vasility.

You have been dismissed for insubordination with Gateway contractors in Skagway, and not allowed to stay at their vasility which is required to run our operation smoothly. Therefore I have no choice but dismiss you from Gateway Transport. This was the second occurrence in 4 days." [sic]

To sum up, Mr. Johnson appears to have been dismissed for alleged failure to do the requisite "post-trip" check on March 8 (which failure is not at all certain) and because he could no longer stay at the Gold Rush Lodge because he had run afoul of Mr. Bricker. This was, of course, on top of the other "incidents" which earned Mr. Johnson the letter of reprimand quoted on page 12. As for not being able to stay at the Gold Rush Lodge - "which is required to run our operation smoothly" - it turned out that one other driver who recently was married to a woman who has a home in Skagway does not stay in the Gold Rush Lodge but this has not affected the smooth running of Gateway's operation so much as to come to Mr. Bjork's notice. Only Mr. Johnson's absence from the lodge would apparently be a problem.

Other inconsistencies in the treatment of Mr. Johnson versus other employees came to light during the hearing.

For example, there is no evidence of any action by the company against the gentleman who was with him in the restaurant while the Subaru was parked outside and who could be considered a party to that "infraction." We were told about one employee going relatively unscathed following incidents which seem to have been as serious as, if not more so than, Mr. Johnson's shortcomings.

The Board was told that Mr. Bricker, and his employees at the Gold Rush Lodge in Skagway when they were standing in for him, were representatives of management in Skagway. (Indeed, Mr. Bjork, as his warning letter to Mr. Johnson indicates, considered that "arguing" with Mr. Bricker was "insubordination.") On May 13, 1992, at least six weeks after this complaint was filed, Karen Queen, one of Mr. Bricker's employees and thus on the management side of things, tried to get driver John Brown to sign a petition, which already had three names on it, that called upon the union to withdraw from pursuing the case of Mr. Johnson's dismissal because it would cost the union and Gateway Transport a lot of money. The petition went on to suggest that Mr. Johnson was totally wrong and Gateway was totally right. Mr. Brown's evidence describing the incident and the petition was not contradicted; there was also evidence from Mr. Bjork that he was aware of this document at the time. The evidence shows that management was involved in its circulation. It was involved in trying to pressure the union to drop Mr. Johnson's case. While the Board is not making such a finding against the company, it is interesting to note that this in itself could well be considered a violation of section 94(1) of the Code:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union."

(emphasis added)

IV

The Board has already noted how Mr. Evans, who played such a large role in casting Mr. Johnson in the worst possible light, did what he could as a member of management to dissuade employees from supporting the union. Mr. Evans was close to Mr. Bjork and the latter was well aware of Mr. Evans' anti-union sentiments and his efforts to put those sentiments into actual practice.

Several factors of significance arise from the evidence which the Board heard during the course of the hearing - not all the minute details of which have been or could have been reported here - that have claimed the Board's attention and affected its reaction to the complaint:

- the various incidents or "infractions" reported on by the supervisory staff (especially the anti-union Mr. Evans) seem to the Board to be molehills transformed into mountains;
- there was an unusually concentrated effort over a short period of four days to document the shortcomings of Mr. Johnson; some of the allegations made against him lacked the content to support the conclusion suggested by supervisory staff;

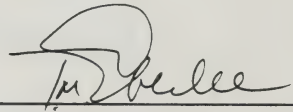
- his record before March 4, 1992 had been without black marks;
- there was in all the evidence, including that concerning the management-circulated petition of May 13, 1992, the suggestion of an unusual campaign to "get" one individual;
- that individual was one who symbolized the union's presence at Gateway in that he was the union steward and a member of the bargaining committee.

On a balance of probabilities, the Board concludes that Mr. Johnson's firing was motivated, to some extent at least, by a desire on the part of some members of management to get rid of a prominent union supporter. Anti-union animus was a proximate cause. Thus, his dismissal was contrary to section 94(3)(a)(i) and 96 of the Code.

Under section 99, the Board has power to remedy the effects of such a violation. Accordingly, the Board orders Gateway Transport to comply with and to cease contravening the Code and to:

1. Reinstate Mr. Johnson in the employment from which he was dismissed on March 10, 1992, within 10 days of the date of these reasons for decision; and
2. Pay to Mr. Johnson forthwith compensation for lost wages equivalent to that which he would have earned between his suspension from employment prior to his dismissal and the date of his reinstatement.

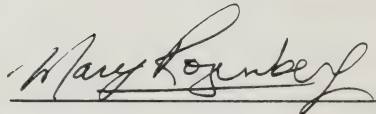
The Board appoints P.F. Kirkland, regional director and registrar, Vancouver, or a person named by him, to assist the parties to implement the foregoing orders. The Board shall remain seized of the matter in order to determine any question that may arise with respect to the foregoing orders and to issue a formal order should such be required.



Thomas M. Eberlee
Vice-Chair



Calvin B. Davis
Member of the Board



Mary Rozenberg
Member of the Board

ISSUED at Ottawa, this 20th day of July 1992.

information

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Summary

HARRY FINLEY, COMPLAINANT,
AND VIA RAIL CANADA INC.,
RESPONDENT EMPLOYER.

Board File: 950-231

Decision No.: 948

An electrician employed by VIA Rail Canada Inc. (VIA) was dismissed after he had accumulated more than 60 demerit points. He complained to the Board under the Canada Labour Code (Part II - Occupational Safety and Health) that VIA's action was contrary to the Code in that it was taken against him because he had invoked his right to refuse to work where a condition was dangerous.

The Board agreed and directed VIA to re-employ him and to compensate him for all lost time.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé de Décision

HARRY FINLEY, PLAIGNANT, ET
VIA RAIL CANADA INC.,
EMPLOYEUR INTIMÉ.

Dossier du Conseil: 950-231

No de Décision: 948

Un électricien qui travaille pour VIA Rail Canada Inc. (VIA Rail) a été congédié après avoir accumulé plus de 60 points de démérite. Dans la plainte qu'il a déposée auprès du Conseil en vertu du Code canadien du travail (Partie II - Sécurité et santé au travail), il allègue que VIA Rail a enfreint le Code en le traitant comme elle l'a fait pour avoir invoqué son droit de refuser de travailler dans des conditions dangereuses.

Le Conseil est du même avis et a ordonné à VIA Rail de réembaucher le plaignant et de le dédommager pour les heures de travail perdues.



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Reasons for Decision

Harry Finley,
complainant,
and
VIA Rail Canada Inc.,
respondent employer.

Board File: 950-231

The Board consisted of Vice-Chairman Thomas M. Eberlee, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

A.R. McGregor and David Lewis, for the complainant, Harry Finley; and
Anne Cartier, for the respondent employer, VIA Rail Canada Inc.

I

Harry Finley was an electrician employed by VIA Rail Canada Inc. (VIA) at its Winnipeg maintenance centre. He was dismissed on February 10, 1992 after accumulating more than 60 demerit marks over a period of some five to six months. He filed a complaint with the Board on March 27, 1992, alleging that his treatment by VIA and ultimate dismissal occurred because he had exercised his right under Part II of the Code to refuse to work in an unsafe situation. The Board heard the matter in Winnipeg on July 7, 8 and 9, 1992. Counsel for VIA raised two preliminary objections, one having to do with the question of whether there had in

fact been a refusal to work that would give the Board jurisdiction to entertain a complaint, and the other as to whether the complaint itself might have been filed too late and might not be entertainable by the Board. The Board decided that these points could only be determined on the basis of the facts which would emerge during the course of the hearing. They will be dealt with later in these reasons.

II

Mr. Finley began working for Canadian National almost 20 years ago and then was transferred to VIA when it took over the maintenance of its own equipment from CN. Until July 1991, neither CN nor VIA had occasion to discipline him; his record was totally clear.

The evidence shows that early in 1991, he became concerned about safety issues and especially about the possibility of locomotives and cars being moved while he and his fellows were working on maintenance and repairs underneath and around them. The basic system provided in the railway operating rules to warn persons that work is being done on railway equipment is known as "blue signal protection." A blue flag is flown in daylight and a blue light is displayed in darkness to provide that warning and to prohibit any movement of the railway equipment itself, or of any other equipment onto the particular track where the work is located.

The Board was told that nobody was satisfied that this warning system was sufficient. Various approaches and devices were tested in order to find something better that would effectively block any train movement. A particular

procedure seemed to solve the problem. It was tested in June and the day shift employees were satisfied. Mr. Finley did not believe that it was good enough.

On or about June 24, 1991, he approached Michael Shaman, the director of the Winnipeg Maintenance Centre, and told him the latest "train securement policy" was inadequate; he did not trust it to ensure that equipment would not move while he and others were working on it. He told the Board that he said to Mr. Shaman he would have to refuse to work in such circumstances because of the danger unless they implemented a better system. In his testimony, Mr. Shaman could not remember whether Mr. Finley had actually said he would refuse to work if the problem were not resolved. He did not deny that Mr. Finley might have said this. In the absence of any contradictory evidence, the Board finds that Mr. Finley did state that he intended to refuse to work if the circumstances were not changed.

In the Board's opinion, Mr. Finley's advice to Mr. Shaman that he had resolved to refuse to work under certain circumstances was what is contemplated under section 128(1) of the Code:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

It was also the report that is contemplated under section 128(6):

"128.(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected."

That Mr. Finley did not at this point advise a member of the safety and health committee or a safety and health representative does not in any way make his invocation of section 128 less than real or valid. This is not a procedural requirement, the absence of which in this situation rendered the process somehow outside the ambit of section 128. There could well be a fact situation where a failure to meet this procedural requirement might be a serious defect, but not here. Moreover, the employer, in the person of Mr. Shaman, did not insist that he report the circumstances to a member of the committee or to such a representative. He did not give any indication that Mr. Finley's "failure" to have so advised these functionaries somehow nullified the process in which they were involved. He took Mr. Finley seriously, as an employer basically is expected to do under the law, and decided that Mr. Finley's claim should be investigated. Thus he followed the fundamental requirement of section 128(7):

"128.(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee."

Again, the fact that he did not have the investigation carried out in the presence of a non-management member of the safety and health committee or of a safety and health representative does not alter the fact that the investigation was on all fours with section 128(7). Mr. Finley could probably have insisted effectively on the presence of one or other such persons, but he was content with what Mr. Shaman proposed to do.

A test was carried out to see whether the locomotive was locked in place by the system then in use - or could be made to move. Mr. Finley was present for the test and was accompanied by a colleague, Harvey Devisser. The locomotive did move. The latest system was shown to be inadequate. Mr. Finley's fear proved to be justified. The employer agreed, abandoned this system and proceeded to try to find better measures.

Since the employer did not dispute Mr. Finley's "report" concerning the system under section 128(6) and since the investigation under 128(7) resulted in the abandonment of that system, Mr. Finley was satisfied and he ceased to have "reasonable cause to believe" that that particular unsafe condition continued to exist. Thus, there was no occasion for the rest of section 128 or section 129 to be invoked. That particular episode under section 128 was closed, although probably not forgotten by his supervisors. His subsequent and ongoing expressions of concern over safety

matters during June, July and August 1991, undoubtedly reminded them often enough of that refusal under section 128 and underlined his further refusal which occurred on August 29, 1991. One suspects that he came to be perceived as a safety nuisance.

These incidents, except the one on August 29, were not dealt with under section 128 and cannot form a direct basis for any determination by this Board under section 133 that there has been a violation of section 147(a). (More about these technicalities later.) But they do show that Mr. Finley's concerns, particularly about possible train movements, were not frivolous and were shared by co-workers. They also show that Mr. Finley was not afraid to make written reports concerning incidents that he considered to be unsafe or potentially unsafe and to name supervisors whom he believed to be responsible for allowing unsafe situations to occur. For example, he mentioned foreman Dave Hunt in a June 1991 incident report; supervisors B. Collis and D. Gaudet in a July 30, 1991 incident report and supervisor Dieter Bruning in an August 20, 1991 safety hazard notice.

These gentlemen were not called upon to testify, but it is safe to infer that they were embarrassed and annoyed by Mr. Finley's reports. This comes through in respect of Mr. Finley's "Safety Hazard Notice" dated August 20, 1991 which was addressed to supervisor Bruning:

"I have noted at MZ wheel drop pit (5650) a condition which constitutes a safety hazard untrained personnel operating overhead crane, told D. Bruning. D. Bruning let them continue."

Supervisor Bruning wrote a reply on a form provided for

that purpose on the same date:

"The procedure for filling out S.H.N. is as follows:

- 1. Inform supervisor of the problem*
- 2. Supervisor has one shift to correct problem*
- 3. If not corrected fill out S.H.N.*

Crane training has started and all employees required to have training will be trained as soon as possible."

Late in July, they began to supervise Mr. Finley very closely. After having worked for almost 20 years without being disciplined and without having anything adverse on his record, he began to get into trouble.

The first incident supposedly occurred on or about July 25; it was not taken seriously enough to be made the subject of a formal investigation until August 21, 1991 when Mr. Shaman wrote Mr. Finley a letter telling him to attend a meeting on August 28 to provide a statement concerning five alleged instances of misbehaviour that had occurred on July 25. Among other things, Mr. Finley was accused of being intoxicated on the job. His accusers for the five charges against him were, according to the records submitted to the Board, Messrs Bruning and Collis.

One infers from the records that Mr. Finley successfully answered four of the charges but that management was still convinced he had been drinking on the job. The records show that Mr. Finley was absent from work for about 50 minutes. He explained, according to the records, and he also testified before the Board, that he had been sick and had remained in the washroom for a lengthy period of time. He testified that he had not been drinking. No contradictory evidence, beyond the contents of the written

records themselves, was presented to the Board. These latter were not particularly convincing that Mr. Finley was not sick, as he claimed. Nor did they give much support to the supervisors' claims that he was intoxicated while on company service. Nevertheless, the other member of the supervisory staff who considered the matter on August 28, 1991 did not believe Mr. Finley and assessed him the drastic penalty of 30 demerit points on September 3, 1991. Admittedly, it is not for the Board to act as an arbitrator of the appropriateness of discipline meted out by an employer, but the Board is entitled to draw inferences. And the inference drawn here, in the absence of convincing evidence that the intoxication was real and that the discipline was deserved is that the employer on September 3, 1991 was really taking action against Mr. Finley for what he did on August 29, 1991.

Even before the foregoing matter was "adjudicated" by the company between the August 28, 1991 investigation meeting and the assessment of 30 demerits on September 3, 1991, Mr. Finley got into some new trouble. On August 28, he was notified to attend an investigation meeting on September 4, 1991 into alleged "insolent behaviour" on August 20, 1991 against supervisor Dave Hunt. He was operating a new piece of equipment - a battery flushing wand - when Mr. Hunt appeared in his vicinity. Water from this piece of equipment was sprayed on Mr. Hunt. According to the records, Mr. Hunt considered that Mr. Finley deliberately sprayed him. Again, according to the records one employee witnessed the incident and stated that he felt it was accidental because the nozzle of the thing gave way and water sprayed on both Mr. Hunt and Mr. Finley. The only evidence the Board actually heard was Mr. Finley's. In both his testimony and the written record of the event, he

maintained the spraying was purely accidental because the equipment had malfunctioned.

It is interesting to note, from the records provided by VIA, that at 4:50 p.m., on August 20, around the same time that he had received the safety hazard notice from Mr. Finley, which is referred to on pages 6 and 7, and while he was probably contemplating the reply which is timed as having been made 40 minutes later, supervisor Dieter Bruning encountered a somewhat dripping supervisor Hunt and told him to make a report of the incident. Perhaps Mr. Hunt would not have bothered with the matter if he had not been urged by Mr. Bruning to report it. Mr. Bruning was not without a motive that day for wanting Mr. Finley to be in trouble.

Notwithstanding the conflicting accounts of the incident, Mr. Finley was found to have "wilfully and purposely" sprayed Mr. Hunt. He was found guilty of "insolent behaviour" and assessed 15 demerit marks on September 16, 1991. On balance, the Board considers that in this episode, Mr. Finley was largely the victim, not Mr. Hunt.

On August 29, 1991 - which was several days prior to the actual assessment of demerit marks for the alleged July 25, 1991 and August 20, 1991 incidents - Mr. Finley refused to work in accordance with section 128 of the Code. His assignment was to do repairs under and around various cars parked on a track at the Winnipeg depot. He wanted the rails aligned away from the main track and a lock placed on the switch in order to make sure that no locomotive and/or cars could somehow enter the track on which the cars he was repairing were located and cause them to move. Management (Mr. Bruning) took the position, according to the safety

officer's report, that the blue flag was sufficient. Mr. Finley disagreed and persisted in his refusal.

A safety officer from Labour Canada, W.H. Humiski, was called in. He concluded that a dangerous condition existed - in essence, he confirmed that Mr. Finley was correct - and he issued a direction intended to "provide positive assurance of track protection beyond the use of the blue flag and blue light." Some weeks or months later, at the instance of VIA Rail, a regional safety officer reviewed the direction and rescinded it. The Board is satisfied, however, that Mr. Finley did in fact have "reasonable cause to believe" that a condition of danger existed when he invoked section 128.

As has been stated earlier, Mr. Finley's refusal to work on August 29 was followed by the September 3 decision that he had been intoxicated on the job on July 25, which resulted in his receiving 30 demerit marks. It was also followed on September 16 by another decision that he had engaged in "insolent behaviour" on August 20 and the assessment of a further 15 demerits. The Board has already indicated that the evidence, both the written records and Mr. Finley's testimony, is not particularly supportive of the validity of these decisions and of the punishment meted out to him. The Board believes, on a balance of probabilities, that the findings against Mr. Finley and the severity of the punishment were, in large part, directly attributable to his having been so assiduous in pressing his safety concerns and for having acted in accordance with section 128. The conduct of the company's representatives was, however, cloaked in the garments of the normal discipline investigation system. By this time, the system had "awarded" Mr. Finley a total of 45 demerit marks. Another

15 would push him out the door; the evidence in this case - more of which will be outlined in the following pages - convinces this Board that the dismissal of Mr. Finley for having exercised his right to refuse under section 128, and for generally being a nuisance on safety issues, was a goal which was now pursued by his supervisors. There is no evidence to effectively contradict this inference, based as it is upon what had already happened and bolstered by the next chapter in the drama.

While the "insolent behaviour" charge was still in the discipline mill, supervisory staff reported on another alleged infraction by Mr. Finley on September 9, 1991. On that date, he was testing acid levels in batteries on certain VIA cars. Supervisor Collis claimed to have seen him intentionally spraying the door knob and door of the supervisors' changeroom entrance with battery acid. Supervisors Collis and Bruning tested with litmus paper the liquid, which they found on the door and the handle. They reported in writing that the litmus paper turned purple. They had no doubt, they said, that the liquid was battery acid. Supervisor Hunt reported in writing that the liquid gave off "a strong smell of acid. I touched the liquid with my finger, it felt soapy, like acid."

An investigation hearing was held by the senior shop foreman on September 12, 1991. Mr. Finley described Mr. Collis' claim that he sprayed something on a door as "fabrication or imagination."

The senior shop foreman did not accept anything Mr. Finley stated during the course of the investigation hearing. He concluded, in a memorandum to director Shaman, dated September 17, 1991, that Mr. Finley had in fact sprayed

acid on the door knob in order to cause bodily harm to a supervisor. He recommended Mr. Finley be given 20 demerits and one month's suspension without pay. This would have given Mr. Finley 65 demerits and would have resulted in his dismissal.

Director Shaman accepted the verdict that Mr. Finley had engaged in "intentional spraying of the door knob and door with battery acid" but on September 26, 1991, he reduced the penalty to 10 demerits with 14 days of suspension. Mr. Finley thus was left with a total of 55.

Mr. Shaman testified before this Board that he now knows that battery acid would not turn litmus paper purple. Indeed, it is apparently common knowledge that acid turns litmus paper red.

Thus, whether or not Mr. Finley did spray some liquid on the door - and one wonders even about this part of the story - it was not acid. The Board concludes that this episode was simply something cooked up by supervisors in their continuing effort to get rid of Mr. Finley because he had invoked section 128 and because he had been a "safety nuisance."

Mr. Finley had filed grievances against the three assessments of discipline and demerit marks. At step III of the grievance procedure, a senior official of the union and VIA's manager of labour relations, met and agreed that the 55 demerit marks should be reduced to 45. Counsel for VIA argued that this agreement between the union and VIA had the effect of validating VIA's action toward Mr. Finley up to that point in time. The Board does not consider, however, that it modified the meaning of the facts already

cited, which surrounded the company's conduct toward Mr. Finley, nor did it erase them. Mr. Finley continued to be entitled to put them forward as being evidence in support of his case and the Board had an obligation to give them due weight in its determination of the complaint.

By the late fall and early winter of 1991, Mr. Finley was in a position where it would take only another 15 demerit marks to put him on the street. On January 26, 1992, according to the written record, supervisor Dieter Bruning became suspicious that Mr. Finley was lying to him and falsifying records. Dissatisfied with Mr. Finley's behaviour and apparently with his curt statements concerning his conduct, Mr. Bruning in effect brought new charges against him. An investigation statement was taken from him on January 29, 1992 in which he sought to explain himself. His explanation was not accepted and the net result was that he was found guilty of knowingly falsifying maintenance records, being grossly insubordinate and so forth. He was assessed 40 demerits and fired.

While one cannot be particularly impressed with his conduct in this final episode, the explanation of what he was doing, contained both in the written records and as outlined in his testimony before the Board, is not entirely unreasonable. One cannot be sure, in the light of the "acid" episode, and others already related, that his supervisors were telling the truth about him in this case either. The charges against him may have had some validity, but the affair was greatly exaggerated. Again the Board concludes that this was partly because of Mr. Finley's earlier invocation of section 128 of the Code.

The treatment of Mr. Finley, the assessment of demerit

marks against him which finally added up to more than 60 and resulted in his dismissal effective February 10, 1992 was not the result of several separate and isolated incidents having no relationship to his work refusal. While two of the incidents themselves pre-dated that work refusal on August 29, the punishments for all four, which appear in themselves to be either excessive or outrageous (as in the case of the phony acid incident) came after and were influenced by a desire on the part of VIA supervision to punish and be rid of Mr. Finley. To be rid of him, they had to make sure that he amassed more than 60 demerit points. This, he had done effective February 10, 1992.

III

Mr. Finley's complaint was that the employer had violated section 147(a)(iii), which reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

Only complaints alleging that an employer has violated section 147(a) vis-à-vis an employee "because the employee has acted in accordance with section 128 or 129" may be

entertained by the Board (section 133(1)). And a complaint may be made to the Board only within 90 days of "the date on which the complainant knew, or ... ought to have known, of the action or circumstances giving rise to the complaint." (section 133(2)).

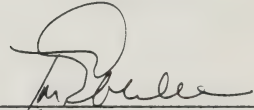
Mr. Finley did have "reasonable cause to believe" on August 29, 1991 that a condition existed which constituted a danger to him (as he also did in June 1991 when the problem was resolved by way of a test of the train "securement" system). He acted in accordance with sections 128 and 129. The employer's agents, in the persons of various supervisors, took action against him over a period of time contrary to section 147(a) because he had acted in accordance with sections 128 and 129. Mr. Finley filed his complaint within 90 days of the date on which the company's action against him culminated in his dismissal - which was the "action or circumstances giving rise to the complaint."

Under section 134 of the Code, the Board has been given the authority to require the remedying of an employer violation of section 147(a). The Board therefore orders VIA Rail Canada Inc. to:

1. Reinstate Mr. Finley, within 10 days of the date of these reasons for decision, in the employment he held prior to his dismissal;
2. Rescind forthwith all demerit marks levied against him since his refusal to work on August 29, 1991 and expunge from his employment record any and all references to the incidents which produced those

demerit marks;

3. Compensate him, within 30 days of the date of these reasons for decision, for the two weeks' work he lost by reason of the suspension levied against him on September 26, 1991;
4. Compensate him, also within 30 days of the date of these reasons for decision, in an amount equivalent to that which he would have earned between the date of his dismissal and the date of his reinstatement in employment;
5. Cease contravening section 147(a) of the Code vis-à-vis Mr. Finley.



Thomas M. Eberlee
Vice-Chairman

DATED at Ottawa, this 21st day of July 1992.

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Summary

GENERAL TEAMSTERS LOCAL 362,
APPLICANT, AND E.S.F. LIMITED, DOING
BUSINESS AS ESSO AVITAT, EMPLOYER.

Board File: 555-3436

Decision No.: 949

Résumé de Décision

LA SECTION LOCALE 362 DU SYNDICAT DES
TEAMSTERS (GENERAL TEAMSTERS),
REQUÉRANTE, ET E.S.F. LIMITED,
EXPLOITÉE SOUS LA RAISON SOCIALE ESSO
AVITAT, EMPLOYEUR.

Dossier du Conseil: 555-3436

Décision n^o: 949

These reasons deal with the
constitutional jurisdiction question
of whether the business of the
employer who operates a "fixed base"
facility for private and charter
aircraft at Edmonton Municipal
Airport constitutes a federal work,
undertaking or business within the
meaning of the Canada Labour Code
(Part I - Industrial Relations).

The Board found in the affirmative.
The terminal operations and the
services supplied by the employer,
which consist mainly of refuelling
aircraft, were found to be an
essential element of aeronautics over
which Parliament has exclusive
jurisdiction.

Les motifs de décision qui suivent
portent sur la question
constitutionnelle de savoir si
l'entreprise de l'employeur qui
exploite des installations fixes à
l'intention d'avions privés et
nolisés à l'aéroport municipal
d'Edmonton constitue une entreprise
fédérale au sens où l'entend le Code
canadien du travail (Partie I -
Relations du travail).

Le Conseil a répondu par
l'affirmative. Il a jugé que les
activités du terminus et les services
fournis par l'employeur (surtout le
ravitaillement en carburant)
constituent un élément essentiel de
l'aéronautique qui relève
exclusivement du Parlement.



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Travail

Reasons for decision

General Teamsters Local 362,
applicant,
 and
 E.S.F. Limited, doing business
 as Esso Avitat,
employer.
 Board File: 555-3436

The Board was composed of Vice-Chair Hugh R. Jamieson and Members Calvin B. Davis and François Bastien.

Appearances:

Mr. Murray D. McGown, Q.C., for the applicant; and
 Mr. Gerald A. Lucas, Q.C., for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with the issue of the constitutional jurisdiction of the Canada Labour Relations Board over the labour relations of E.S.F. Limited (d.b.a. Esso Avitat) hereinafter referred to as E.S.F. or the employer. This question arose in an application for certification which was filed by the General Teamsters Union Local 362 (the union or Local 362) on March 19, 1992 seeking to represent certain employees employed by E.S.F. at the Municipal Airport at Edmonton, Alberta. In response to this application, the employer took the position that the operations of E.S.F. fall within provincial jurisdiction.

The Board heard the parties on this issue at Edmonton on June 8, 1992. On June 22, 1992, the parties were notified that the Board had found the operations of E.S.F. at the Edmonton Municipal Airport to be a federal work, undertaking or business within the meaning of Part I of the Canada Labour Code and that the Board had granted the certification order sought by the union. These are the reasons of the Board relating to the jurisdiction issue.

II

E.S.F. is a wholly-owned subsidiary of Imperial Oil Limited (Imperial). Pursuant to an agreement with Imperial, E.S.F. acts as sales agent and distributor for Imperial at several airports, including Edmonton Municipal.

E.S.F. claims that its main business is that of refuelling aircraft. As a sales agent for Imperial, this is its primary function. Two-thirds of E.S.F.'s revenue is generated by the sale and supply of aircraft fuels, oils and lubricants. Its customers at Edmonton Municipal Airport are mostly private aircraft operators and charter airlines; however, it does have a contract with Canadian Airlines Limited to refuel its commercial aircraft on a time shared basis with a competitor fuel supplier.

To supplement and to enhance its primary business of selling fuel, E.S.F. operates what is known in the industry as a "Fixed Base" at the Edmonton Municipal

Airport. This is a terminal facility which operates twenty-four hours a day, seven days a week. It includes a reception area, pilots' and air crew lounge, passenger lounge and an executive conference room. There is also a flight planning room that is equipped with a computerized weather service system. E.S.F. provides a large ramp area for holding aircraft as well as a 25,000 square-foot hangar for inside parking and storage of aircraft.

Refuelling of aircraft is done by E.S.F. employees from tanker trucks. These employees are trained in fuelling procedures and have knowledge of the types of fuel required by different aircraft. As a fixed base operator, E.S.F. offers other services including the provision of oxygen, oil, nitrogen (for tires), ground power, lavatory service and aircraft cleaning and grooming (interior and exterior). E.S.F. personnel are also involved in aircraft towing, passenger reception, baggage handling, loading of catering provisions like soft drinks and box lunches and other such duties related to ground servicing of aircraft. E.S.F. also supplies a mini-van and a driver to transport passengers and crews to and from downtown Edmonton.

E.S.F. is not involved in aircraft maintenance per se, but it does arrange for minor maintenance and repairs to be done upon request.

III

The scope of Part I of the Canada Labour Code is set out in section 4:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Particularly relevant to this case, a federal work, undertaking or business is defined in section 2 as:

"2. In this Act,

'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(e) aerodromes, aircraft or a line of air transportation,"

For E.S.F. to be found to be a federal work, undertaking or business within the meaning of the Code, the Board must look to the normal or habitual activities of its business as a going concern to ascertain if its operations fall within the terms of section 2(e) which are commonly referred to as "Aeronautics". This normal or habitual test was devised by the Supreme Court of Canada in a series of cases culminating in Northern Telecom Ltd. v. Communications Workers of Canada et al. (1979), 98 D.L.R. (3d) 1; [1980] 1 S.C.R. 115; and 79 CLLC 14,211:

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

- (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
- (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
- (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
- (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.
- (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(pages 13, 132, and 15,363; emphasis added)

Counsel for the union argued that this area of the law was well settled and that operations like those of E.S.F. clearly fall within the federal domain. Counsel referred to some well known precedents including Field Aviation Company Limited v. Alberta Board of Industrial Relations and International Association of Machinists and Aerospace Workers, Local Lodge 1579, [1974] 6 W.W.R. 596; and Butler Aviation of Canada Limited v. International Association of Machinists and Aerospace Workers et al., [1975] F.C. 590.

E.S.F., on the other hand, argued that those cases had been analyzed wrongly and that refuelling of aircraft, which is the primary business of E.S.F. had never, as such, been found to be an integral element of aeronautics. Counsel for E.S.F. took the Board through the jurisprudence attempting to show that none of the cases cited stood for the proposition that refuelling of aircraft or providing ground service such as baggage handling for private aircraft necessarily comes under federal jurisdiction. Counsel pointed out that in each of these other cases there had been considerations other than refuelling that had influenced the findings of federal jurisdiction. Counsel suggested that the other companies involved had also been involved in maintenance or other services which undoubtedly come under the Aeronautics Act, R.S.C. 1985, C.A-2, or that they were providing baggage handling for regularly scheduled commercial airlines.

Distinguishing its own operations from those found to be federal in Field Aviation Company Limited, supra, and Butler Aviation of Canada Limited, supra, E.S.F. argued that it is engaged in the primary business of retail sale of fuel oil products, mainly aviation fuel, which is a provincial matter.

With the utmost respect, we cannot accept that argument. Even if the refuelling functions can be isolated from the rest of E.S.F.'s operations at Edmonton Municipal Airport, which we do not think is appropriate if one is to look at E.S.F.'s business as a going concern, it is our view that the refuelling of aircraft was indeed found to be an integral element of aeronautics by the Federal Court of Appeal in Butler Aviation of Canada Limited, supra:

"Obviously there is no clear cut test that can be applied in each instance. However, I consider that the refuelling of an aircraft between flights is obviously 'necessarily incidental' to its operation, as is the general servicing that the applicant provides."

(page 594, emphasis added)

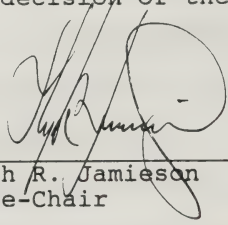
Those words were obviously carefully chosen and, in our respectful opinion, the Court clearly considered refuelling of aircraft to be a significant element supporting a finding that the operations in question came within the scope of federal jurisdiction over aeronautics. We concur with that view and adopt it here.

Looking at the operations of E.S.F. at the Edmonton Municipal Airport as a whole, there can be little room for doubt about the character of the business as a going concern. Notwithstanding the emphasis by counsel on its primary function of refuelling aircraft, E.S.F. is unquestionably a fixed base operator in the aviation industry. It supplies terminal facilities and services to private aircraft operators that are akin to those provided by Transport Canada to commercial airlines at its terminals, albeit on a much smaller scale. E.S.F. does this on a full-time basis on premises and with equipment that are all located on property within the boundaries of Edmonton Municipal Airport. Furthermore, E.S.F. holds itself out as a refueller of commercial airlines and has successfully bid on such contracts as evidenced by its present relationship with Canadian Airlines where it refuels 737 aircraft using Edmonton Municipal Airport. All constitutional facts considered, we are satisfied that there is little about E.S.F.'s business that is only incidental to aviation as it

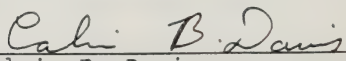
claims. Its whole being and purpose is to provide essential services to customers who are involved in aeronautics.

As such, its operations clearly fall within the intended scope of section 2(e) of the Code. The work performed by the employees of E.S.F. related to ground service of aircraft on an around-the-clock basis, seven days per week is, in our opinion, an essential element of aeronautics over which Parliament has exclusive jurisdiction. This being so, the employees of E.S.F. who are affected by the application for certification by the Teamsters are therefore employees working upon or in connection with the operation of a federal work, undertaking or business within the meaning of section 4 of the Code. We accordingly find that this Board does have constitutional jurisdiction to issue the certification order sought by the union.

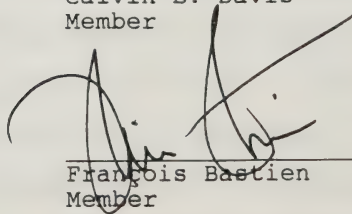
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



François Bastien
Member

DATED at Ottawa this 27th day of July, 1992.

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Summary

DON KOSKI, COMPLAINANT, AND
CANADA POST CORPORATION,
RESPONDENT.

Board File: 950-227

Decision No.: 950

Résumé

DON KOSKI, PLAIGNANT, ET SOCIÉTÉ
CANADIENNE DES POSTES, INTIMÉ.

Dossier du Conseil: 950-227

Décision no: 950

Dismissal. Unfair labour
practice complaint. Sections 133
and 147(a) of the Canada Labour
Code (Part II - Occupational
Safety and Health). Letter
carrier refusing to work after
dusk. Union representative.
Complaint dismissed on the
merits.

Congédiement. Plainte de
pratique déloyale de travail.
Article 133 et alinéa 147a) du
Code canadien du travail (Partie
II - Sécurité et santé au
travail). Facteur qui a refusé
de livrer le courrier après le
coucher du soleil. Représentant
syndical. Plainte rejetée au
fond.

The complainant, a letter carrier
with 16 years experience, has
worked in Port Coquitlam, British
Columbia. On a winter afternoon,
the complainant interrupted his
work two days in a row alleging
that it was unsafe and against
Canada Post policy to deliver
mail after dark. Management
insisted he finish his work. He
refused. An immediate suspension
was imposed after the second
refusal. He was dismissed soon
after. A safety investigation
was carried out by the union and
management. Management refused
to consider that darkness was, in
the circumstances, a dangerous
condition allowing the
complainant to refuse to work.
The complainant phoned Labour
Canada who told him it did not
consider the issue warranted its
involvement. No further action
was taken under Part II of the
Code. A grievance was
immediately filed and, two months
later, the instant complaint was
filed with the Board.

Le plaignant, un facteur ayant 16
ans d'expérience, travaillait à
Port Coquitlam (Colombie-
Britannique). Un après-midi
d'hiver, dès le coucher du
soleil, le plaignant a interrompu
son travail en disant qu'il était
dangereux de travailler à la
nuit et que la Société des
postes avait comme politique de
ne pas livrer de courrier à la
nuit. La direction a insisté
en vain qu'il finisse sa ronde.
Il a été suspendu après son
second refus, puis congédié. Une
enquête de sécurité a été menée
par l'employeur et le syndicat.
L'enquêteur patronal a conclu
que, dans les circonstances,
l'obscurité n'était pas
dangereuse. Le plaignant a
téléphoné à Travail Canada qui a
refusé d'enquêter. Aucune autre
démarche n'a été faite en vertu
de la Partie II du Code. Un
grief a été déposé sur-le-champ.
La présente plainte a été
présentée au Conseil deux mois
plus tard.

Canada Post argued as a
preliminary objection that the
complainant had not met the
requirements of subsection 133(3)
of the Code. This argument was
dismissed. The Board determined
that the complainant had made it
clear to his employer that he
would not work under certain
conditions he considered
hazardous.

La Société des postes a soulevé
un moyen préliminaire fondé sur
le paragraphe 133(3) du Code,
invokant que le plaignant
n'avait pas respecté cette
disposition au moment de son
refus. Le moyen a été rejeté.
Le Conseil a jugé que le
plaignant en avait assez dit à
l'employeur pour indiquer qu'il
ne travaillerait pas dans
certaines conditions qu'il
jugeait risquées.

On the merits, the evidence revealed that the employee was strongly opposed to new controls introduced by management to reduce record high overtime at his depot. Further, he considered that Canada Post had to apply its own policy against night delivery. The Board found that the differences over this issue came to a head at a point where the employer would need overtime to be done. Safety was not a genuine issue. Management's decision had nothing to do with anti-safety animus. The complaint was dismissed. It will be up to an arbitrator to decide if the dismissal was justified pursuant to the collective agreement.

Suggestions made by the union of anti-union animus on the part of Canada Post were made in argument. They were dismissed. Such a fact was not alleged and no complaint was filed under the Code (Part I - Industrial Relations), section 94 et seq. The Board determined that it should not substitute itself to a party that knowingly chose not to make such a complaint.

Au fond, la preuve a révélé que l'employé était fermement opposé à de nouveaux contrôles décidés par la Société des postes afin de réduire le surtemps. En outre il jugeait que la poste devait appliquer sa politique à ce sujet. Le Conseil a jugé que le différend à ce sujet a éclaté à un moment où l'employeur avait besoin qu'on fasse du surtemps. Les préoccupations de santé et sécurité n'étaient pas authentiques. Le congédiement était étranger aux questions de santé et de sécurité. La plainte a été rejetée. Il incombera à un arbitre de décider si le congédiement était justifié selon la convention collective.

Le syndicat a soulevé en argumentation l'existence d'un sentiment antisyndical, chez la Société des postes. Le Conseil l'a rejeté. Il n'y a pas eu de telles allégations avant, et aucune plainte fondée sur le Code (Partie I - Relations du travail), articles 94 et suivants, n'a été présentée. Le Conseil a jugé qu'il ne pouvait pas se substituer à une partie qui avait choisi en connaissance de cause de ne pas déposer de telle plainte.

Reasons for decision

Don Koski,
complainant employee,
and
Canada Post Corporation,
respondent employer.

Board File: 950-227

The Board was composed of Messrs. Serge Brault and J. Philippe Morneault, Vice-Chairmen, and J. Jacques Alary, Member.

Appearances

Ms. Catherine Sullivan, and Ms. Georgina Coustalin, counsel, assisted by Messrs. Larry Honeybourne and Ron Kucey (CUPW), for Mr. Don Koski;

Mr. Sean Kennedy, assisted by Mr. Paul Straszak, Manager, Labour Relations, and Mr. Andrew Nacklicki, Labour Relations Officer, for Canada Post Corporation.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

The Complaint

This case deals with a complaint filed with the Board on March 4, 1992 by Mr. Don Koski (the complainant), a letter carrier with Canada Post Corporation (the respondent, the Corporation or CPC) in Port Coquitlam (B.C.). He alleges pursuant to Section 133 that the respondent violated section 147(a)(iii) of the Canada Labour Code (Part II - Occupational Safety and Health) by dismissing him in

December 1991, allegedly for refusing to deliver mail after dark.

Section 147(a)(iii) reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

The complainant alleges that he was dismissed because he exercised the right to refuse to perform dangerous work as provided for in section 128 of the Code.

The relevant provisions of the Code read as follows:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

...

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

...

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

...

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place.

129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."

Section 133 imposes the burden of proof on the employer in complaints such as this one. On the other hand, for such a complaint to be valid, the complainant must have complied with section 128(6) or 129(1), cited above:

"133. (1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

...

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

A hearing was held in Vancouver, B.C., on April 27 and 28 and on June 23 and 24, 1992.

II

The Incidents

Close to a dozen witnesses testified, some on the circumstances leading to Mr. Koski's dismissal and others on the practice at CPC with regard to the delivery of mail after sunset.

On Monday, December 9th, Mr. Koski resumed his normal route at Port Coquitlam's CPC depot. He had been away on leave for a few weeks following a minor accident and then for union activities. At that time, the complainant was the Canadian Union of Postal Workers' (CUPW) senior shop steward at his depot. Until a month before his dismissal he had also been a member of the Health and Safety Committee at the depot. In passing, it is not alleged that his union activities had anything to do with his dismissal.

At the time of his dismissal, Mr. Koski had been a letter carrier for 16 years. It was his first job after graduation. He has worked as a letter carrier at the Port Coquitlam depot since May 1985. His current route, also known as walk, is located in an urban neighbourhood. It is divided about equally between the older and the newer part of the city and it comprises mainly private homes. Some streets have no sidewalks, while some have only one; others may be poorly lit. The pavement at some calls was damaged and a few other hazards were later identified.

December is the busiest time of year at CPC, and letter carriers have larger volumes to deliver. CPC will often, as was the case here, require staff to start their day earlier. Management may also prioritize the mail so as to allow the letter carriers to spend more time on the street rather than doing inside work. When a letter carrier sorts his mail in the morning and expects that he will not be able to complete his run during his normal shift, therefore placing himself in an overtime situation, he usually informs management who will in turn call in relief staff to help complete delivery without having to pay overtime.

While the normal work day of a postman starts at 7:00 a.m., on December 9, Mr. Koski reported for work at 6:30 a.m. The normal practice is for letter carriers to come back to their depot for lunch. At noon, Mr. Koski came back and after lunch took part in a grievance meeting with Mr. Ron Kucey, the Chairman of CUPW's Royal City Local, and supervisor Sparkes. The meeting took place around 12:30 p.m. and lasted for about half an hour. When he was about to leave around 1:00 p.m. to resume his walk, Mr. Koski informed his boss that he was in an overtime situation. Mr. Sparkes answered that he should have told

him sooner and that it was too late to call in relief staff. His normal work day was over by 2:30 p.m. Mr. Koski stayed on until 4:30 p.m., when he still had 40-odd calls to make. At that point, he decided to interrupt his delivery and phoned his supervisor, Ron Sparkes. He told him that he could not complete his route because of nightfall, and was intent on coming back to the depot. After some discussion, supervisor Sparkes, who considered Mr. Koski's claim without foundation, issued what the parties refer to as a "direct order" for the complainant to complete his delivery before coming back. The complainant refused, insisting that darkness prevented him from doing so. Given Mr. Koski's insistence, they engaged in a discussion on how the undelivered mail would be brought back to the postal station. An arrangement was made, and the complainant eventually came back to the depot. By then his supervisor was quite annoyed. For him, the mail had to be delivered. A discussion ensued with respect to the grounds for Mr. Koski's concerns. Mr. Sparkes reminded the complainant that his new issue uniform bore fluorescent stripes and that he could have completed his route. Mr. Koski would not comply.

It was in these circumstances that Mr. Koski signed out and left around 5:00 p.m. that day. Mr. Sparkes entered in his computer a summary of the incident and left.

Given these incidents, Mr. Sparkes contacted Andrew Nacklicki, a labour relations officer with CPC, on Tuesday. He sought advice on how to deal with the issue, since he expected more was forthcoming. Mr. Nacklicki recommended prudence and reminded him about safety vests; he suggested Mr. Sparkes offer the complainant one. They also agreed that discipline might be warranted and that a 24-hour notice would be issued to Mr. Koski for a

disciplinary interview. One of management's concerns was the possible ripple effect of Mr. Koski's refusal if indeed he was allowed to interrupt delivery at nightfall.

Following Mr. Sparkes' inquiry, Andrew Nacklicki contacted a CPC investigator, Derek Smith, who had been with the Corporation for 17 years, 9 of which as a letter carrier. In his career as a safety officer, refusal to deliver for reason of darkness had never been an issue.

The next day Mr. Koski reported around 6:30 a.m. to sort his mail; in addition to his normal volume, he had the previous day's undelivered mail to handle. Nonetheless, he did not ask for relief to be called in. Normally after his morning deliveries he was picked up at 11:45 for lunch back at the depot. Because of his early start, the noon pick-up had been advanced to 11:15 a.m. from the usual 11:45 a.m. Mr. Koski testified that he forgot about the rendez-vous and had to walk back, which obviously took more time. According to his complaint, one minute after sunset on Tuesday Mr. Koski again interrupted his walk. He did not call in and just returned to the depot. He used the back entrance and was met not long after by Mr. Sparkes and another supervisor. He told them that because of darkness he had interrupted his walk, and gave no further explanation. He testified that Mr. Sparkes did not enquire more precisely into his reason. Mr. Sparkes testified he did make enquiries about specifics, but he got no answer, Mr. Koski refusing to talk without a witness. Mr. Sparkes again formally ordered the complainant to complete his walk.

Mr. Sparkes suggested he wear a safety vest if he was concerned with darkness. He declined. Contrary to the previous day, he was not wearing his new uniform with the reflective stripes, but the old one without such stripes. He testified that in view of the rain forecast he had opted for his old one which was lighter. As it turned out, it did rain and he wore the regulatory rain gear, a bright yellow cape.

At that point, the supervisor handed out a form provided for under the collective agreement notifying the complainant that he would have to show up for a disciplinary interview within the next 24 hours, because he had refused the day before to complete his round. The complainant did not budge. He reiterated that it was unsafe to walk in the dark and, more or less, added that if Mr. Sparkes thought he was right, he only needed to discipline him. By then the complainant was on the phone in Mr. Sparkes' office with his union president Mr. Kucey. They only talked for a few moments, Mr. Kucey was basically suggesting Mr. Koski avoid confrontation and leave the depot. Given Mr. Koski's second refusal, Mr. Sparkes proceeded to draft a second 24-hour notice as well as a letter of indefinite suspension, which he immediately handed over to the complainant. Soon after, Mr. Koski left on his bicycle, wearing a helmet and a safety vest.

When asked at the hearing about any specific reason for interrupting delivery that day, Mr. Koski basically reiterated that it was "unsafe to deliver mail after dark." He explained his attitude with Mr. Sparkes that day by the fact that he was alone with two management representatives. Without a witness of his own, he did feel it was risky to stay there by himself and engage in discussion. He said he recalled an incident that had led

to a dismissal a year or two before where a letter carrier had been, in his opinion, caught off guard in a discussion with two managers and even physically assailed. He said that person had not been able to defend himself even at arbitration and had been dismissed.

CPC had doubts whether Mr. Koski's refusals were really safety concerns and not plain labour relations concerns. To be on the safe side, the day following Mr. Koski's suspension, an on-site investigation was arranged by Andrew Nacklicki to include himself, Derek Smith, Ron Kucey and Mr. Koski. The meeting took place on the Thursday in the neighbourhood where Mr. Koski had stopped delivery. (No one had called in a Labour Canada officer at that point.) Mr. Smith had found that the conditions on Mr. Koski's route were generally good. Indeed there was some broken pavement but no specific hazards except maybe at one or two calls. The inspection ended at dusk.

After their tour, Mr. Smith informed the complainant and Mr. Kucey, who had not been made aware before of Mr. Koski's refusal on the Monday, that he did not consider either refusal to qualify under Part II. They all agreed that the union was to inform Mr. Smith the next day of its intentions with respect to calling in Labour Canada for further investigation of the matter.

The next day when Mr. Kucey called Labour Canada he was informed that Mr. Koski had himself phoned earlier that day and had been told that Labour Canada did not consider that the issue warranted the involvement of one of its officers. Neither Mr. Koski nor Mr. Kucey insisted on Labour Canada's involvement. Not hearing from the union, Mr. Smith reached Mr. Kucey later that day. The latter informed him that the union had asked Labour Canada to

investigate and on their refusal to do so, said they were confident they could resolve the issue with management without outside help. Following its disciplinary investigation, CPC turned Mr. Koski's suspension into a dismissal. A grievance was eventually filed and is still pending; this complaint was filed over two months later.

Background Policy Issues

Relief Staff

The standard CPC policy concerning the daily delivery of mail is not in dispute. A letter carrier must complete daily the delivery of the mail sorted for his route. If volume or other circumstances prevent him from doing so, then management takes corrective steps to achieve that goal.

Delivery After Dark

On the issue of delivery after dark, according to Mr. Koski's evidence, letter carriers had never done any in Port Coquitlam and often in the past had brought back mail undelivered due to darkness. Mr. Koski also contended that prior to Mr. Sparkes' tenure as supervisor, his predecessor Bob Chartier often allowed such interruption in delivery without asking any questions, let alone imposing discipline. A listing of "dos and don'ts" contained in an employee manual issued by the Corporation provides that letter carriers should not deliver mail after dark. In a sense that evidence was recognized as accurate by management insofar as CPC acknowledges that delivery after dark is discouraged and that special safety measures may be warranted in those instances where it is necessary.

Mr. Koski and Mr. Sparkes were apparently not aware that a national grievance against delivery after dark had been filed by the Letter Carriers' Union of Canada (LCUC) in the late 1980's, when it was the bargaining agent for the letter carriers. That grievance was eventually settled with CPC. Our understanding of the settlement, which took the form of a protocol entered into between LCUC president and management, is that delivery can take place after dark as long as it is done in safe conditions. The collective agreement also contains provisions to that effect, for instance calling for safety vests to be issued by CPC to letter carriers on request.

Overall, the evidence adduced by both sides on the issue of delivery after sunset, while somewhat contested, was nonetheless fairly consistent. On the issue of bringing mail back to the depot, conflicting evidence was heard. On balance it appears that it will on occasion be done and that darkness is not per se a condition preventing delivery. Mr. Chartier's evidence as to the past practice at Port Coquitlam was very straightforward for him, a no-delivery-after-dark policy neither existed at CPC in general, nor at Port Coquitlam in particular.

Overtime at Port Coquitlam

Another element worth mentioning relates to the work environment at the Port Coquitlam depot in the fall of 1991. In the Corporation's view, the depot had a very poor overtime record, in the sense that the Corporation felt excessive overtime was consistently paid to a few letter carriers. Four letter carriers were apparently high overtime consumers. At the top of the list was Mr. Koski.

In late spring of that year, Mr. Sparkes and three new managers had been transferred to the depot with the mission to reduce overtime. The Corporation was clear about its intentions and quickly addressed the issue through different measures. Mr. Koski did not agree with the measures taken and considered CPC overzealous and unjust. Partly in reaction, he often reminded his fellow workers of their right to break time, lunch time, wash-up time, etc. As far as he was personally concerned, Mr. Koski did not consider he abused overtime.

III

Parties' Submissions

The employer challenged this complaint on three grounds. First, CPC did not accept the burden of proof as outlined in the Code, given the lack of specificity in the complainant's allegations. Second, it alleged that there was no reasonable ground for the complainant's perceived fear for his safety. Finally, CPC's counsel argued that working in darkness was a condition inherent to the work of a letter carrier and that it followed that Mr. Koski could not validly invoke section 128 of the Code. According to counsel, the complaint should fail because the requirements of section 133(3) had not been met.

For the Complainant

Counsel for the complainant first argued that Mr. Koski had fully complied with the procedural requirements of Part II of the Code in his dealings with management.

Counsel insisted that Mr. Koski's report to management about his refusal to work because of darkness was specific enough to trigger the provision into action. CPC's premature and hastily imposed discipline had subverted the system and prevented any meaningful investigation to be done.

On the merits, counsel argued that CPC had failed to disprove the alleged violation of the Code. Counsel reiterated that discipline was imposed in the context of the two major facts involving Mr. Koski: the overtime issue that CPC wanted cleaned up and Mr. Koski's leadership as a vocal shop steward.

Counsel Sullivan concluded that Mr. Koski had indeed reasonable belief to fear for his safety and that his credibility could not be questioned. She added that CPC's decision may have been politically motivated, management fearing that some kind of ripple effect could follow Mr. Koski's refusals.

Finally, counsel for Mr. Koski disputed the assertion that working after dark was normal for letter carriers and that any danger flowing from that would be inherent.

IV

1. Procedural Matters

One of the issues in dispute is whether Mr. Koski satisfied the requirements of section 128(6) and 129(1) as required under section 133(3).

In a decision issued recently (Harry Finley, (1992), as yet unreported CLRB decision on. 948), a complaint similar to this one was allowed after the Board satisfied itself the employee had acted in accordance with section 128 of Part II.

In that case, a long-time electrician for VIA Rail was dismissed after having accumulated demerit marks over a few months. He contested his dismissal on the ground that the employer had dismissed him for having exercised his right to refuse to perform dangerous work. VIA objected that there had not been a refusal to work as provided for in the Code and that the Board could not entertain the complaint. VIA argued that Mr. Finley had merely contested a policy as being inadequate and not actually said he refused to work.

What is being argued here, is that Mr. Koski did not supplement his refusal with any specifics that could have linked his refusal to Part II. In Harry Finley, supra, the Board, on the evidence, found that the complainant had indeed, satisfied the requirements of the Code in acting as follows:

"In the Board's opinion, Mr. Finley's advice to Mr. Shaman [his superior] that he had resolved to refuse to work under certain circumstances was what is contemplated under section 128(1) of the Code:

128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

(page 3)

Such is our finding here, there is no doubt that Mr. Koski refused to work and that he mentioned an objective condition of work as being the cause for his refusal. As for subsection 133(3), we are satisfied that this complaint may be entertained on its merits and that the burden was on management to disprove the allegations.

2. The Merits

To follow up on our previous finding, there is indeed ample evidence to the effect that Mr. Koski quit work at 4:30 p.m. last December because of darkness. Evidence on the existence of a few specific hazards was adduced. These were actually investigated and found after the fact for the obvious reason that Mr. Koski's concern was more of a general nature: once darkness has set in, letter carriers should not be on the streets. This explains in part why Mr. Koski did not supplement his refusal with more specifics when Mr. Sparkes insisted on knowing what precise danger had made him end his walk. What Mr. Koski challenged was the whole idea that CPC can ask its letter carriers to remain on the streets after sunset. As appears from the complaint, only a few minutes after sunset, which in all likelihood is to be distinguished from pitch darkness, Mr. Koski would not go any further.

It is an undisputed fact that CPC's procedures call for letter carriers not to deliver mail at a given call where a safety hazard is present: dangerous driveway, animal, poor lighting, etc. A lot was said about the fact that two or three specific hazards were identified on Mr. Koski's route the day after his suspension although not necessarily at addresses where mail had not been delivered. Indeed some of these hazards like broken pavement might arguably become more hazardous when

compounded with darkness. This being said, it appears from the collective agreement, without having to decide the issue, that the parties did not rule out mail delivery by letter carriers after dark. As mentioned in argument it would have been somewhat ironic to rule out any delivery after dark in a country with an Arctic winter. This impression is confirmed by the provision calling for fluorescent safety vests to be provided on request to letter carriers. Again, the extent and the contractual meaning of those provisions are not for us to determine, yet the existence of those provisions is relevant here if only to fully appreciate the attitudes of those involved. In the end, what the Board has to ascertain is whether CPC in any way disciplined Mr. Koski because he had exercised his right to refuse to perform dangerous work under Part II of the Code.

The incidents leading to this complaint must be viewed in their broader context. The evidence established without a doubt that Mr. Koski is a seasoned union representative; up until a few weeks before his suspension he was directly involved with the Health and Safety Committee at the Port Coquitlam depot. The issue of work after sunset had been raised at the committee but no decision had been made.

Mr. Koski is also familiar with the collective agreement and with the basics of Part II of the Code. At the time, there was confrontation brewing about excessive overtime, and the Christmas peak was just about to start. There is no denial that Mr. Sparkes was intent on cutting sharply the overtime paid to a few letter carriers. For his part, Mr. Koski felt very strongly that the staff was paid only what they were owed and that they were within their right to claim overtime. For instance, Mr. Koski testified very openly about his own way of acquiring overtime and also

about his way of keeping track of all his time to ensure it was duly remunerated. He testified on his reminders to his colleagues about their rights to claim time for wash-ups, breaks, etc. This dispute on overtime is in our view central to what happened in December. Mr. Sparkes was intent on cutting excessive costs, and Mr. Koski considered there were no excesses. They were both on a collision course and actually collided when the mail volumes reached their December peak.

After having considered all the evidence the Board finds that CPC has established to our satisfaction that Mr. Koski was not disciplined because he had exercised his right to refuse to perform dangerous work under Part II of the Code. He was disciplined because he had refused to complete his day of work as requested rightly or wrongly by his employer.

For the reasons he gave us, Mr. Koski has always been of the strong view that letter carriers were not to do deliveries after dark. He even considered that such was the Corporation's policy and his refusal to work after sunset was only emphasizing his view. There is no doubt that CPC's literature may be viewed as sending mixed signals with respect to mail delivery after dark. Yet when we look at it as a whole and in context it does not appear to us, without having to decide the issue, as straightforward as suggested by the complainant. In essence, in terms of customer service as well as personnel policy, mail deliveries should, for obvious reasons, take place during the day. Routes and shifts appear to be designed to be completed as much as possible in the daytime. This being said, all sorts of business as well as natural reasons may call for after daylight work for letter carriers, albeit exceptional and involuntary.

Because of its importance at Port Coquitlam, overtime, and maybe more generally, Mr. Koski's reaction to management's stiffer controls are also central to our finding. Mr. Sparkes wanted to cut overtime and December is the busiest time of the year. If a letter carrier is in an overtime situation and no relief staff has been called in, this will more than likely cause disruption. If in addition, mail ends up not being delivered, then tempers may explode. Undelivered mail obviously means trouble.

Mr. Koski felt that the Corporation had a policy calling for no delivery after dark. Of course it is trite to say that implicit in such a policy would be safety concerns related to darkness. Yet we do not find, for the purpose of this complaint, that safety concerns were at the root of Mr. Koski's actions. His concerns were to ensure what he considered to be its stated policy on work after dark and also to show Mr. Sparkes what he thought about his cutbacks on overtime. It may be sufficient to invoke general safety concerns to trigger section 133 into action; the Code does not prevent management from calling evidence to establish the opposite. This is what happened here. As another panel of the Board has recently found:

"While there can be little question that the discipline levied ... was remotely connected to the refusal in that it was a consequential part of the events that flowed therefrom, we cannot find in the circumstances that [the employer] violated the Code."

Patrick R. Ridge, (1992), as yet unreported
CLRB decision no. 934, page 6)

Whether Mr. Koski's action was justified or complies with the collective agreement and whether Canada Post's reaction was justified or excessive are matters for an arbitrator to determine, and the Board has no intention of dealing with those issues in this decision. Our finding

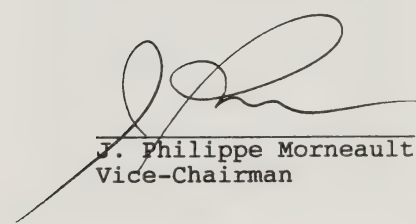
is restricted to our determination that Canada Post has met the requirements of section 147(a) of the Code.

A final word about the suggestions made in argument by his counsel that Mr. Koski's union involvement might have coloured management's reaction against him. There is no evidence to that effect. Furthermore, we are not seized with a complaint to that effect, and it is not our role to second guess what the parties freely decide in circumstances where they obviously knew what they were doing when they chose not to make such an allegation or complaint under Part I of the Code. (see Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRBR n°. 792)).

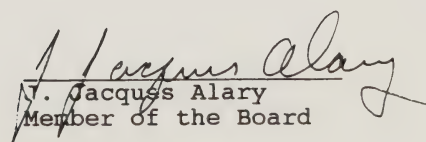
For all these reasons, this complaint is dismissed.



Serge Brault
Vice-Chairman



J. Philippe Morneau
Vice-Chairman



J. Jacques Alary
Member of the Board

DATED at Ottawa, this 21st day of August 1992.

information

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SUMMARY

SYNDICAT DE L'INFORMATION DE TÉLÉ-MÉTROPOLE, APPLICANT UNION, TÉLÉ-MÉTROPOLE INC., EMPLOYER, AND SYNDICAT GÉNÉRAL DU CINÉMA ET DE LA TÉLÉVISION (CNTU), SECTION TÉLÉ-MÉTROPOLE, AND SYNDICAT DES ANNONCEURS, LECTEURS ET COMMENTATEURS DE TÉLÉ-MÉTROPOLE (CNTU), FORMER CERTIFIED BARGAINING AGENTS.

Board File: 555-3472

Decision No.: 951

Application for certification filed pursuant to sections 24, 27 and 28 of the Canada Labour Code (Part I - Industrial Relations). Raid seeking to consolidate existing units. Television station.

The Board does not prohibit in the case of raids changes to existing bargaining units. That type of application is allowed under section 27, and it is the Board's responsibility to deal with it pursuant to section 28. In the instant case, the applicant wished to combine the on-air staff and the newsroom staff who prepares the material to be read on the air. The unit sought is appropriate, and the application does not seek to circumvent the rules concerning union support. The Board allowed the application.

RÉSUMÉ

SYNDICAT DE L'INFORMATION DE TÉLÉ-MÉTROPOLE, SYNDICAT REQUÉRANT, TÉLÉ-MÉTROPOLE INC., EMPLOYEUR, ET LE SYNDICAT GÉNÉRAL DU CINÉMA ET DE LA TÉLÉVISION (CSN), SECTION TÉLÉ-MÉTROPOLE, ET SYNDICAT DES ANNONCEURS, LECTEURS ET COMMENTATEURS DE TÉLÉ-MÉTROPOLE (CSN), ANCIENS AGENTS NÉGOCIATEURS ACCRÉDITÉS.

Dossier du Conseil: 555-3472

Décision n°: 951

Demande d'accréditation présentée en vertu du Code canadien du travail (Partie I - Relations du travail) art. 24, 27 et 28. Maraude, visant à consolider des unités existantes. Station de télévision.

Le Conseil n'a pas comme politique d'interdire dans le cas de maraudages la modification d'une unité existante ou la consolidation de plusieurs unités. Une telle demande est permise aux termes de l'article 27 et c'est au Conseil d'en juger selon l'article 28. En l'espèce, le requérant voulait regrouper du personnel travaillant en ondes et du personnel du services des nouvelles préparant le matériel allant en ondes. L'unité recherchée est habile et la demande ne vise pas à échapper aux règles en matière de représentativité. Le Conseil a accueilli la demande.



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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Syndicat de l'information de
Télé-Métropole,

applicant union,

Télé-Métropole Inc.,
Montréal, Quebec,

employer,

and

Syndicat général du cinéma et
de la télévision (CNTU),
section Télé-Métropole, and
Syndicat des annonceurs,
lecteurs et commentateurs de
Télé-Métropole (CNTU),

*former certified bargaining
agents.*

Board File: 555-3472

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Gaston Nadeau, for the Syndicat de l'information de
Télé-Métropole;

Mr. Richard Montpetit, for Télé-Métropole; and Mr. Jacques
Morand, for the Syndicat général du cinéma et de la
télévision (CNTU), section Télé-Métropole, and the Syndicat
des annonceurs, lecteurs et commentateurs de Télé-Métropole
(CNTU).

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

The Board has before it an application for certification
filed pursuant to section 24 of the Canada Labour Code (Part
I - Industrial Relations).

The application is not contested and was decided without a
hearing, on the basis of the report of our senior labour
relations officer. The case is of interest because the

Syndicat de l'information de Télé-Métropole (the union or the applicant) is seeking in the same application to displace two unions certified for two bargaining units of the same employer (Télé-Métropole). It seeks principally to merge into a single unit these two separate bargaining units that until now have been represented by the former bargaining agents.

The existing units can be described as follows: one comprising employees, announcers, journalists, etc., working on air, and another comprising employees of the news service working in research and editing.

It appears that the Board's administrative services opposed, as it were, the filing of the application as worded. Apparently, the applicant was told that two units could not be merged in this manner because Board practices in the case of a raid prohibited in principle the amending of the description of units already deemed appropriate for bargaining. For this reason, the applicant was therefore told that it had to file two applications, which the union refused to do.

II

Some clarification is necessary. The applicant did not have to file two applications for certification. To the extent that the union was seeking certification for an expanded unit, it was free to file its application as it did. Section 27(1) of the Code in fact stipulates the following:

"27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining."

(emphasis added)

A union is perfectly free to file such an application, just as an employer is free to challenge the scope of an existing unit during raiding. A more compelling reason for allowing a union to make such an application is that, ultimately, it is the Board that defines the appropriate bargaining unit, and the Board is not bound by such an application. Section 28(b) of the Code states the following:

"28. Where the Board

...

(b) has determined the unit that constitutes a unit appropriate for collective bargaining,

...

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

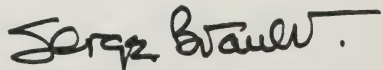
If the Board finds that the proposed unit is not appropriate, it can always divide it into a number of units. In short, the filing of such an application is entirely proper.

It is true that the practice is not to alter the unit during raiding, and there is a reason for this. Moreover, the burden is on the union seeking to alter an existing unit to show that it should be altered. Having said this, however, the Board wishes to point out that there is no bar to the making of such an application, either at law or in terms of labour relations practices. Distinctions must be made. There are applications that seek to fragment units and those that seek to merge them. There is a clear policy not to fragment an existing unit. (See Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59); Entreprises Télé-Capitale Ltée, division CFCM-TV et CKMI-TV (1976), 16 di 230; and 77 CLLC 16,075 (CLRB no. 71); Saskatchewan Wheat Pool et al. (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,104 (CLRB no. 83); and Canada Post Corporation (1990), 81 di 187 (CLRB no. 818).) The policy governing mergers is different. If

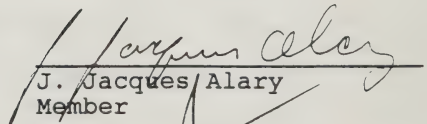
the evidence shows that an expanded unit would be appropriate and particularly where the proposed changes are not intended, as is often the case, to indirectly circumvent the representative character provisions of the Code, then the Board can enlarge the bargaining unit.

To prohibit systematically any reorganization of units during raiding would be irrational because the Board allows such reorganizations outside formal raiding, under section 18 of the Code (power of review). Moreover, it often applies the rules of certification to such proceedings (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675); and Canadian Broadcasting Corporation (1991), 84 di 2 (CLRB no. 846)).

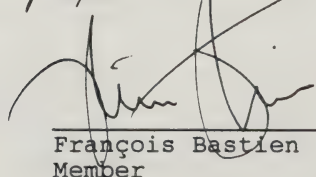
The parties are in agreement, in the instant case, with the reorganization and the union has the representative character in respect of each of the old units and the consolidated unit. Finally, the proposed unit is appropriate for collective bargaining. Accordingly, the Board allows the application and issues a certification order in respect of the proposed unit.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 28th day of August 1992.

Information

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Summary

NATHALIE LAPOINTE ET AL.,
COMPLAINANTS, ENERGY AND
CHEMICAL WORKERS UNION, LOCAL
146, RESPONDENT, AND PUROLATOR
COURIER, LTD., EMPLOYER.

Board File: 745-3614

Decision No.: 952

Unfair labour practice pertaining to union's duty of fair representation. Section 37 of the Canada Labour Code (Part I - Industrial Relations). Union refusing to file grievance challenging seniority list. Complaint allowed. The complainants are ex-Gelco employees now working for Purolator. Gelco was not unionized while Purolator employees were represented by the respondent union. Purolator considered buying Gelco in early 1989 and consulted with the union. The union took up the matter with its members, who declined to fully recognize Gelco employees' seniority. Later, Purolator and Gelco decided to merge under the Purolator name. Ex-Gelco employees were integrated in the bargaining unit.

The collective agreement was renewed, but no changes were made. Seniority accrues on the basis of service for the company within the unit. The company did not, based on an earlier position of the union, recognize fully ex-Gelco employees' seniority.

Complainants wanted to file a grievance via the union, but it refused on the basis of the vote of its general assembly held prior to the merger.

Résumé

NATHALIE LAPOINTE ET AUTRES,
PLAIGNANTS, SYNDICAT DES
TRAVAILLEURS DE L'ÉNERGIE ET DE LA
CHIMIE, SECTION LOCALE 146, INTIMÉ,
ET PUROLATOR COURRIER LTÉE,
EMPLOYEUR.

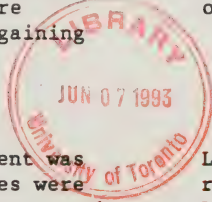
Dossier du Conseil: 745-3614

No de Décision: 952

Plainte de pratique déloyale relative au devoir de représentation juste d'un syndicat. Article 37 du Code canadien du travail (Partie I - Relations du travail). Refus du syndicat de déposer un grief en vue de corriger une liste d'ancienneté. Plainte accueillie. Les plaignants sont d'anciens employés de Gelco travaillant maintenant pour Purolator. Les employés de Gelco n'étaient pas syndiqués, alors que les employés de Purolator étaient représentés par le syndicat intimé. Purolator voulait acheter Gelco au début de 1989 et avait consulté le syndicat. Le syndicat a consulté ses membres, et ceux-ci ont refusé de reconnaître intégralement l'ancienneté des employés de Gelco. Par la suite, Purolator et Gelco ont fusionné sous la raison sociale de Purolator. Les employés de Gelco ont été intégrés dans l'unité.

La convention collective a été renouvelée sans changement. L'ancienneté se calcule selon les états de service pour la compagnie au sein de l'unité de négociation. La compagnie n'a pas reconnu les états de service au sein de Gelco selon le désir exprimé par le syndicat.

Les plaignants ont voulu présenter un grief, ce qui leur a été refusé vu la décision antérieure de l'assemblée.



Sometime after, another group of non-unionized employees were integrated in the unit. They were Purolator employees who had up to then been excluded. Union meeting voted for full recognition of seniority.

The Board found that the way the union handled the complainants' problem violated section 37. The union never turned its mind to the issue since its assembly had taken a vote. The union's conduct was grossly negligent and arbitrary. No consideration was given to the fact that the companies had merged nor to the text of the agreement. The complaint was allowed.

The Board ordered the union to file a grievance and, failing settlement, refer the case to arbitration, and to pay all legal fees.

Quelque temps après, un autre groupe a été intégré dans l'unité de négociation. Il s'agissait d'employés de Purolator qui avaient jusqu'alors été exclus de l'unité. Cette fois, l'assemblée du syndicat a permis la reconnaissance intégrale de l'ancienneté.

Le Conseil a jugé que la façon d'agir du syndicat violait l'article 37. Par suite des résultats du vote à l'assemblée, le syndicat ne s'est jamais vraiment occupé du cas des plaignants. La conduite syndicale a été grossièrement négligente et arbitraire. Ni la notion de fusion ni le texte de la convention n'ont été pris en considération. La plainte a été accueillie.

Le Conseil a ordonné au syndicat de présenter un grief, et, au besoin, de renvoyer l'affaire à l'arbitrage ainsi que de payer les honoraires d'avocats.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Nathalie Lapointe, Jean
Barry, Nancy Langlais,
Lorraine Brault,

co-complainants,

and

Energy and Chemical Workers
Union, Local 146,

respondent,

and

Purolator Courier Ltd.,
employer.

Board File: 745-3614

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Evelyn Bourassa and Mr. François Bastien, Members.

Appearances

Ms. Nathalie Lapointe, for herself and for Nancy Langlais,
Lorraine Brault and Jean Barry, co-complainants;

Mr. Robert Côté, assisted by Mr. François L'Heureux,
national representative, and Mr. Daniel Cloutier, president
of Local 146, for the Energy and Chemical Workers Union; and
Mr. Jean-Yves Fillion, Human Resources Division, for
Purolator Courier Ltd.

These reasons for decision were written by Mr. Serge Brault,
Vice-Chairman.

I

The Proceeding

This decision is further to a complaint of unfair labour
practice made pursuant to section 37 of the Canada Labour
Code (Part I - Industrial Relations) dealing with the duty
of fair representation of trade unions. This section reads
as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

This complaint was filed by Nathalie Lapointe and three of her fellow workers (the complainants), all office employees of Purolator Courier Ltd. (the employer or Purolator). The complainants alleged that the Energy and Chemical Workers Union, Local 146 (the union or the ECWU), breached its duty of representation by not allowing them to present a grievance contesting their seniority as recognized by the employer.

A hearing was held in this case in Montréal on March 16, 1992.

II

Evidence

It is not contested that when Ms. Lapointe and her fellow workers asked that a grievance be presented, they were all covered by a collective agreement entered into by the union and the employer.

The Gelco-Purolator Merger

Purolator is a well-known courier service. In the spring of 1989, it absorbed another courier service, Gelco Express Ltd. (Gelco), an affiliate of Air Canada. At the time, the complainants were working for Gelco in Montréal and were not unionized. At the same time, Purolator's office employees in Montréal and Québec were unionized, their bargaining agent being the ECWU, whereas Purolator office employees working elsewhere were not.

The ECWU has some 8 000 members in Quebec, belonging to some 120 locals. It employs 9 permanent union advisers, plus a number of office staff. This is a well-established union. It has two units at Purolator, one comprised of office employees.

In its discussions with Gelco, Purolator had offered to absorb a certain number of employees, including the complainants. Purolator proposed that the Gelco employees who were to become members of its unit of office employees be directly integrated into this unit and fall, as it were, under the umbrella of its collective agreement with the ECWU.

In integrating these employees, Purolator wanted to fully recognize their record of service, i.e., their seniority, as if they had always worked for it. In other words, in the case of Ms. Lapointe, who began working for Gelco in 1988, Purolator offered to integrate her into the office employees unit and recognize her seniority as dating from her hiring by Gelco in 1988.

At the time, the collective agreement with the ECWU was about to expire. It contained the following provisions:

"12.01 Definition of Seniority

Seniority is the total length of continuous service of an employee of the Company, in the bargaining unit, since his/her most recent date of hiring.

12.02 Acquisition of Seniority

Seniority begins to accrue upon successful completion by an employee, in the bargaining unit, of the probationary period provided for in article 11."

(translation)

Mindful of these provisions, Purolator, which was still engaged in its discussions with Gelco, sent the then director of services for the ECWU, Aimé Raiche, a formal proposal for integration as described above.

The union did not acknowledge receipt of or reply to the proposal. It nevertheless made known verbally that it had no objection to the employees in question being integrated with full recognition of their seniority, but only for the purposes of determining pay and vacation days. As for the remaining items, in particular job security and choice of vacation dates, the union indicated that it intended to make its position subject to the approval of the general meeting of its members.

The union presented rather confused evidence of the initiatives it took subsequently to this end. One thing is clear: it proposed to its membership the idea of fully recognizing seniority, and they rejected it. The formula approved by the members was apparently the partial recognition described earlier. It was then April 1989 and no agreement had yet been reached by Gelco and Purolator.

Negotiations between Gelco and Purolator finally produced an agreement at the beginning of June 1989. The agreement took the form of a merger of companies under the Canada Corporations Act, R.S.C. 1970, c. C-32, and not an acquisition. The new company, however, retained the name Purolator.

Thus, effective the beginning of June, the complainants became employees of the new Purolator resulting from the merger. In the ensuing weeks, they joined the union. A strike was declared in August and lasted until December 1989 when a new collective agreement was signed. This agreement renewed the seniority clause, unchanged, with no provision

for the former Gelco employees. The collective agreement also provided for the periodic publication of a seniority list.

In the spring of 1990, the employer published a seniority list for the first time since the strike. It prepared this list, it said, in accordance with the union's stated position of not in effect fully recognizing the complainants' seniority. Their seniority therefore dated, for certain purposes, from June 1989.

When the complainants saw this list, which they considered unfair and contrary to the collective agreement, they asked the union to file a grievance. They made repeated requests to this effect for weeks, but nothing happened. When they learned that the union would not allow a grievance to be presented, they filed their complaint with the Board in April 1990. The union argued that it was merely abiding by the decision of the 1989 general meeting not to fully recognize the seniority of former Gelco employees.

The two parties acknowledged that the collective agreement measured seniority in two ways: length of time with the company and length of time in the bargaining unit.

Enlargement of the Bargaining Unit

Until 1991, Purolator employees working outside Montréal and Québec were not unionized. When the employer and the ECWU entered into the new collective agreement at the end of 1989, both agreed at the time that the union could seek, without opposition from the employer, to expand its certification to include all of Purolator's employees in the province of Quebec then not unionized.

Proceedings to this end were instituted before the Board shortly thereafter and, as agreed, they were not contested (file 530-1879). On March 13, 1991, the Board issued a new certification order to the ECWU covering all Purolator office employees in Quebec. The union thus integrated into its office employees unit Purolator employees who until then were excluded from it, i.e., were not unionized.

The Board wishes to point out that according to our files, not one of the employees integrated when this certificate was amended had previously belonged to the union. (Concerning the Board's practice of consulting its own files, see William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 11; and 84 CLLC 16,054 (CLRBR no. 476); and Iberia Airlines of Spain (1988), 74 di 1 (CLRBR no. 687).)

As was the case with the complainants in 1990, the question of the seniority of these new employees arose. The union again decided to refer the matter to the general meeting. This time, the meeting fully recognized the seniority of the new members, as if they had always been both members of the bargaining unit and employees of the company. The meeting apparently based its decision on the fact that this group of new members were already Purolator employees when they were integrated into the unit. Four employees were thus integrated into the office employees unit, including a former Gelco employee originally absorbed by a Purolator office which until then was not unionized. In her case, her seniority dated only from her officially becoming a Purolator employee, not from her hiring by Gelco.

All these events relating to the enlargement of the bargaining unit followed the union's refusal to recognize the complainants' seniority and the filing of their complaint. They came to light at the hearing. The Board nevertheless considered them relevant because they shed

light on all the circumstances that gave rise to the complaint, in particular the union's conduct.

Moreover, an examination of the seniority list as of the date of the hearing reveals that at least one former Gelco employee, who is not one of the complainants, had all her record of service with Gelco fully recognized, this time with no objection from the union. When asked to explain the union's treatment of this employee, its representative replied that this was surely a mistake of the employer that had escaped the attention of the union which knew nothing of it until the hearing.

III

Arguments of the Parties

Nathalie Lapointe, herself a complainant, acted as spokesperson for her fellow workers. She was not represented by counsel. She confined herself, in her brief comments, to the basic facts.

She essentially argued that it was unfair to deny the complainants the seniority accumulated since the Gelco-Purolator merger. They had the right to grieve under the collective agreement and the union arbitrarily denied them this right. This injustice was especially apparent and arbitrary because some employees, although excluded, like the complainants, from the bargaining unit under article 12 of the agreement, were nevertheless credited with more seniority by the general meeting, without justification and without regard to the complainants.

Counsel for the union, for his part, argued that the union's refusal to recognize seniority was legitimate. This refusal was justified by the reasonable interpretation that the

union gave to the collective agreement. According to counsel, the complainants had not always been "employees of the Company" within the meaning of clause 12.01 of the agreement. Consequently, the ECWU had not acted in a discriminatory manner or clearly in bad faith when it considered that the complainants were not entitled to more seniority than the general meeting decided to recognize.

Counsel added that while it was true that this decision of the union prejudiced the complainants, this prejudice resulted not from a violation of the Code, but from the exercise of a right conferred on the general meeting of a union. According to counsel, the union could legitimately refuse to file a grievance that could in practice have invalidated a decision of its general meeting.

In the final analysis, the union did not consider valid the complainants' request to file a grievance since this request contradicted the decision of the union meeting held in May 1989. The fact that the matter was not discussed or the seniority clause amended during renewal of the collective agreement was of no consequence. The ECWU considered that the meaning of the words "most recent date of hiring" (clause 12.01) obviously could not have changed with the new agreement, with or without the merger. In the union's opinion, the date on which the complainants were hired was and remained the date on which they were officially integrated into Purolator, and not the date of their hiring by Gelco.

IV

Analysis

Section 37 of the Code and its scope are well known. It is the Supreme Court of Canada that developed what has now

become the standard test applied in determining whether a union has legally discharged its duty of fair representation. The Court described this test as follows in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188)

In that judgment, the Supreme Court cites approvingly the following excerpt from a Board decision, which is of some interest here:

"In past decisions in cases of this kind, the Board has repeatedly stated that it would not assume the role of arbitrator and decide the merits of a grievance, but that it must, in a number of situations, closely examine these merits in order to identify certain facts it requires in order to make an enlightened decision, within the limits of its jurisdiction. Although the Board might appear, in this situation, to be functioning as the arbitrator, this would be a false perception of its role which, in the end, would be strictly limited to

deciding whether or not, in a particular case, the bargaining agent breached its duty of fair representation."

(Jacques Lecavalier (1983), 54 di 100 (CLRB no. 443), page 125)

The union does not deny taking the action in question. Indeed, it claims responsibility for it. This action was based on the vote of the general meeting. It was almost solely on the basis of this vote in 1989 that the union refused to file a grievance.

The union did not, as it were, investigate the matter. It relied in the matter on the general meeting, as if it were all-powerful. The allegation and the problem of the complainants were well known: the case of the former Gelco employees had been discussed repeatedly. However, the union stated at the hearing that it knew none of the details, until the hearing, of a Gelco-Purolator merger, rather than an acquisition of the former by the latter. This was a serious matter on which an investigation would have shed light and which is important in the context of applying the seniority provisions of the collective agreement. Moreover, the union did not know what the evidence revealed, namely, that according to the files of Purolator's personnel department, the complainants were considered employees transferred within the company itself rather than hired from the outside. In other words, according to these files, the "most recent date of hiring" of the complainants was the date they were hired by Gelco.

Purolator and Gelco merged and continued to operate as one company under the name Purolator. As far as we know, and we make no determination in this regard, under the merger agreement, the former employees of Gelco are employees of the "new Purolator" no less than are the former employees of

the "old Purolator." The union did not ask itself these questions.

Moreover, when the parties signed a new collective agreement at the end of 1989, they obviously did not take into account the merger of the two companies, nor did they commit to writing the wish expressed by the union regarding the former employees of Gelco. Clause 2.02 of the collective agreement stipulates the following:

"2.02 Special agreement

No special agreement, between an employee and the Company, dealing with working conditions other than those covered by this Agreement, is valid unless it has received the approval in writing of the Company and of the officials duly authorized by the Union and the Company."

(translation)

What the evidence reveals is that the union simply did not address these questions when it refused to allow a grievance to be filed. It acted without malice, but nevertheless without knowledge of the basic facts. It did not investigate, did not verify anything and did not seek an opinion; it just let time pass without considering the matter. As the Supreme Court stated in Guy Gagnon, supra:

"[The] discretion [of the union] must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, ..."

(pages 527; 654; and 12,188)

The ECWU simply could not rely on a union vote, without seriously examining the complainants' case. To begin with, the vote was taken at a time when the general meeting could not have known that Gelco and Purolator would merge. Second, a new collective agreement had been signed since that meeting took place. The companies merged when the collective agreement was signed in 1989 and the parties had not seen fit to amend the text of article 12 or conclude a

specific agreement. If the meaning of the term "Company" in the collective agreement did not change, it may not be because the employer still calls itself Purolator.

Having said this, it is not up to the Board to interpret the collective agreement. One has to assume that when they sign an agreement, the signatories are actually seeking its intended effects. Faced with the complainants' request, the first question the union should have asked itself, at the very least, was whether the text of the agreement of December 1989 reflected the wish expressed by the general meeting six months earlier. It obviously did not ask itself this question and, in not doing so, acted arbitrarily.

The Board wishes to make perfectly clear that recourse to the general meeting is not wrong per se (Rayonier Canada (B.C.) Ltd., [1975] 2 Can LRBR 196 (B.C.)). In Yves Beaudoin et al. (1981), 45 di 283; and [1982] 1 Can LRBR 197 (CLRB no. 342), members of a union complained that the general meeting had altered their seniority and that the union had subsequently denied them the right to file a grievance to have it restored to its previous level. The Board had the following to say on this subject:

"... The Board has continuously maintained, as a cornerstone of its jurisprudence, that the union was entitled, without the interference of this Board, to exercise its judgment in the progression or discontinuance, or even the inception, if applicable, of a grievance. Provided always, of course, that the control of the procedure is exercised '... fairly and without discrimination', and that decisions are made subsequent to the application of due thought and consideration. ...

...

In this case we have fifteen employees, members of the bargaining unit, all Carmen Trainees who have been promoted to management positions, or who are in the process of so being, grieving the employer's implementation of a demand made by the majority of the bargaining unit, that the employer adhere to the union's interpretation of clause 58.22(i) of the collective agreement. This demand by the union came as a result of a majority decision taken at a properly convoked

local union meeting in December of 1980. The local union voted almost unanimously in the interests of 150 of its membership, rather than as they perceived it, prejudicing the interests of the 150 to further favour an already advantaged group of 15, the complainants. The Board considers such a decision as a manifestation of the advancement of the interests of the majority, usually considered to be a democratic norm. That the interests of the majority were not consistent with those of a special-interest minority is not surprising. The world in which the will of the majority prevails has its concomitant minorities.

The fact that the ideal democratic institutions function on the basis of determination by majority infers the presence of minorities. A responsible majority concerns itself with the needs of its constituent minority or minorities. The Board was provided with evidence of the bargaining agent's action in the interests of the minority in the matter which is the subject of the complaints. The Board takes no position as to its adequacy or efficacy, but does note, however, that the interests of the complainants were, and had for some time been, pursued by the bargaining agent in its bargaining relations with the employer. ..."

(pages 289-290; and 202-203)

That case was decided under the text of the predecessor of section 37. What the decision essentially states is that the union meeting can favour a group. However, in doing so, it must demonstrate that it considered the situation of the minority and acted without discrimination and after due thought and consideration.

The Board does not have to decide the legality of the general meeting's decision. Having said this, however, the Board wishes to point out that just because the general meeting apparently decided a question does not relieve the union officers of their obligation subsequently to consider seriously the merits of a claim that is related to this question and that is made by one of their members who claims to be the victim of a violation of the collective agreement.

Refusing the complainants' request, in the light of the approval given subsequently to certain employees until then excluded, to supersede them in their seniority rights is

evidence, if not of bad faith, then at the very least of gross ignorance. This is especially surprising because the complainants had joined the union immediately upon beginning work for Purolator, and had also participated in the strike, whereas the employees who superseded them with the blessing of the general meeting had done none of these things. (Regarding the addition of employees to an existing unit, see Teleglobe Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198).)

In fact, the contradictory replies of the union to these two groups are, in the Board's view, significant. Obviously we are not called upon to decide the legality of the second reply, but the action nevertheless strengthens our belief that the reply given to the complainants in the spring of 1990 was indeed arbitrary.

Lest any doubt remain in this regard, seniority is a fundamental right that cannot be treated lightly, particularly in difficult economic times. The union contravened section 37 of the Code.

V

Conclusion

Where a trade union has contravened section 37 of the Code, section 99(1)(b) provides the following:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with ... section 37 ..., the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as

the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take or carry on;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

The Board orders the union to comply with section 37 and to present a grievance on the complainants' behalf within 10 days following receipt of this decision. The grievance shall request full recognition of their seniority, for all purposes, under their collective agreement. The union shall examine seriously the complainants' grievance in the light of all the facts and the collective agreement, bearing in mind that this could affect the rights of other employees it represents.

Failing a settlement of the complainants' grievance to their satisfaction at the various steps of the grievance procedure, the grievance will then be referred to arbitration to be decided by an arbitrator in accordance with the collective agreement. To this end, the Board absolves the complainants and the union of their failure to observe the time limits specified for the grievance and arbitration procedure.

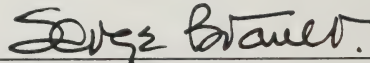
The complainants did not retain counsel to represent them before the Board and they handled themselves well. Nevertheless, if they wish to retain counsel to advise them during the grievance procedure and to represent them during the arbitration proceeding, they can do so, and the

reasonable expenses incurred in this regard will be borne by the union.

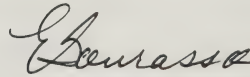
This decision could affect the rights of other Purolator employees and they should be informed of this fact. The Board therefore orders Purolator, pursuant to section 16(g) of the Code, to post a copy of this decision for 30 days, in all the work locations of the employees in the bargaining unit, within 10 days of receiving said decision.

Finally, should the arbitrator allow the complainants' grievance and order Purolator to pay the complainants a sum of money, this sum will be borne by the union and shall cover the entire period, up to the date of the present decision.

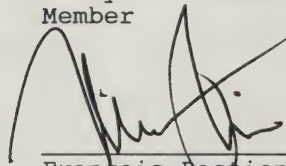
The Board reserves the right to decide, on request, any dispute arising from the implementation of this decision. Finally, it designates Ms. Suzanne Pichette, director of the Board's Montréal office, or any senior labour relations officer in her office, to assist the parties in implementing said decision.



Serge Brault
Vice-Chairman



Evelyn Bourassa
Member



François Bastien
Member

ISSUED at Ottawa, this 25th day of August 1992.

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Summary

PETER ELCOMBE, COMPLAINANT, CANADIAN
UNION OF POSTAL WORKERS, RESPONDENT,
AND CANADA POST CORPORATION,
EMPLOYER.

Board File: 745-4166

Decision No.: 953

Résumé de Décision

PETER ELCOMBE, PLAIGNANT, SYNDICAT
DES POSTIERS DU CANADA, INTIMÉ, ET
SOCIÉTÉ CANADIENNE DES POSTES,
EMPLOYEUR.

Dossier du Conseil: 745-4166

Décision n°: 953

This is a complaint under the duty of
fair representation provisions in
section 37 of the Canada Labour Code
(Part I - Industrial Relations),
wherein the complainant alleges that
the union failed to represent him
properly at an arbitration hearing.
The grounds for the allegations went
to the union's failure to object to
certain evidence which the
complainant says was ruled to be
inadmissible in an interim award
issued earlier in the proceedings.
The complainant also claimed that the
union erred in withdrawing another
related grievance. He said the
outcome of this grievance could have
resulted in a different decision from
the arbitrator.

The union had failed to file a reply
to the complaint; therefore, the
Board dealt with the ramifications of
this in its reasons. As for the
merit of the complaint, the Board
found it to be totally unfounded. In
this regard, the Board reconfirmed
that it has a very limited role to
play vis-à-vis the quality of a
union's representation before an
arbitrator. The Board also found
that the union had acted well within
its discretion as the exclusive
bargaining agent when it withdrew the
other grievance.

Il s'agit d'une plainte portant sur
le devoir de représentation juste
prévu à l'article 37 du Code canadien
du travail (Partie I - Relations du
travail). Le plaignant allègue que
le syndicat ne l'a pas bien
représenté à l'audience d'arbitrage
quand celui-ci n'a pas contesté la
présentation de certains éléments de
preuve qui, d'après le plaignant,
avaient été jugés inadmissibles dans
une sentence provisoire rendue plus
tôt dans l'affaire. En outre, le
plaignant prétend que le syndicat a
fait erreur lorsqu'il avait retiré un
autre grief connexe. À son avis, le
résultat de ce grief aurait pu amener
l'arbitre à tirer une autre
conclusion.

Le syndicat n'a pas répondu à la
plainte; le Conseil s'est donc penché
sur les incidences d'une telle
conduite dans ses motifs. Le Conseil
juge que la plainte est totalement
sans fondement. À cet égard, le
Conseil mentionne à nouveau son rôle
très limité en ce qui a trait à la
qualité de la représentation
syndicale à l'arbitrage. Il juge
d'ailleurs que le syndicat a agi en
conformité avec le pouvoir
discrétionnaire qui lui incombe en
tant qu'agent négociateur exclusif
lorsqu'il a retiré l'autre grief.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Peter Elcombe,
complainant,

Canadian Union of Postal
Workers,
respondent,

and

Canada Post Corporation,
employer.

Board file: 745-4166

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Peter Elcombe, for himself;

Messrs. Gordon Fischer and Brian Henderson, for the
respondent; and

Mr. Phillip M. Dempsey, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint filed on February 13, 1992 by Mr. Peter Elcombe in which he alleges that the Canadian Union of Postal Workers (CUPW or the union) breached its statutory duty of fair representation contained in section 37 of the Canada Labour Code:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

Mr. Elcombe is employed by Canada Post Corporation (CPC or the employer) as a letter carrier. In 1987, he was suspended from duty without pay on four different occasions. These suspensions were grieved and referred to arbitration. One of these grievances, which related to a ten-day suspension for spending excessive time on mail sortation, was dismissed by Arbitrator Thomas Jolliffe on October 12, 1988.

The other three grievances are central to these proceedings. In May 1987, Mr. Elcombe was suspended for fifteen days for allegedly incurring excessive overtime and, in October 1987, he received another suspension of twenty days for alleged acts of vandalism related to writing graffiti in the men's washroom at a Letter Carrier Depot. The third grievance, which we know very little about, was apparently also related to a suspension for alleged poor work performance.

To make a long story short, an arbitration hearing into these three grievances was convened in February 1989. In an interim award dated July 20, 1989, Arbitrator Mr. Thomas Jolliffe ruled against the admissibility of certain documentary evidence that the employer proposed to enter. Up to that point in time, the grievances had been carried by the Letter Carriers Union of Canada (LCUC). However, as a result of a decision by this Board, CUPW took over the bargaining

rights for the Letter Carrier bargaining unit; therefore, when these grievances continued in November 1990, it was CUPW representatives that appeared on Mr. Elcombe's behalf. According to Mr. Elcombe, these representatives failed to object to certain evidence going in which he says was ruled to be inadmissible in the interim award. This resulted in his grievance over the fifteen-day suspension being dismissed. The graffiti grievance was allowed after CPC failed to present further evidence following the interim award.

Mr. Elcombe also claimed that CUPW made another critical error in his defence by withdrawing the third grievance at the outset of the hearing. He said that that grievance could have affected the overall outcome because it dealt with the fact that the employer had not done any measurement of mail volume to determine if the overtime incurred by him resulted from working conditions or from misconduct.

It was these actions by CUPW that Mr. Elcombe relies upon to support his allegations that the union violated section 37 of the Code. He says that the union acted in bad faith by failing to provide him with competent and knowledgeable counsel to handle his case or, he added, CUPW deliberately chose to ignore the interim ruling of the arbitrator so that his case would fail at arbitration.

CUPW failed to respond to the complaint, therefore, a hearing was conducted into this matter at Edmonton on July 30, 1992. At the hearing, CPC raised the issue of the timeliness of the complaint alleging that it had been filed outside the ninety-day time limit.

II

Before dealing with the complaint itself, it is perhaps worthwhile to comment upon the effect of a trade union failing to reply to a complaint under section 37 of the Code as occurred here.

It should be well known by now that the Board has a discretion to deal with this type of complaint with or without a public hearing. The authority for the Board to dispose of a complaint under section 37 without the need for a public hearing is found in section 98(2) of the Code:

"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."

In Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRB no. 515) the Board set out its views of the legislative intent behind section 98(2) (then section 188(1.1)). The main stimulus identified by the Board for Parliament's waiving of the need for a public hearing in certain circumstances, was the enormous expense being inflicted upon bargaining agents defending themselves before the Board in response to section 37 complaints.

Prior to the insertion of section 98(2) into the Code in 1984, the Board was obliged to hear all complaints under section 37 (then section 136.1). The simple act of filing a complaint set the Board's process in motion and, considering that settlements are rare in

this type of complaint, practically every matter arising under section 37 required a public hearing before it could be disposed of. The effect was that many bargaining agents became hesitant to exercise their lawful right to drop grievances which they normally would not have carried to arbitration. The cost factor of this, in both financial and other resources, became a major concern for the labour relations community at large, causing a vigorous lobby to have the legislation changed. When one thinks about it, it made little sense for bargaining agents to be forced to spend more before the Board answering complaints than they would have spent had they proceeded with the grievances in question. This was particularly so when the cost of taking a dubious grievance to arbitration had been a major factor in the union's original decision not to proceed in the first place.

Clearly, this additional financial burden on bargaining agents and the detrimental effect on the lawful discretion of trade unions not to proceed to arbitration with all grievances was a concern for Parliament when it enacted section 98(2).

Perhaps more to the point, the Board also set out in the McCance decision what steps it would take to satisfy natural justice considerations where a hearing was not held. Basically, what the Board said was that before it would decide whether a hearing was to be waived in any given complaint, the Board would ensure that it would have a complete picture before it. This would be accomplished through the written submissions of the parties along with the report of a Board investigating officer which would contain a full and

comprehensive account of all of the relevant facts and the positions of the parties.

Obviously, this requires the co-operation of the parties, especially the trade union respondent to a complaint. Without an insight into what was in the minds of the bargaining agent representatives when they took whatever action that is being complained about, the Board's hands are tied and a public hearing becomes almost a certainty. In the absence of a written reply, or in the alternative, a verbal account of the relevant facts that can be included in the Board's investigating officer's report, the Board's discretion under section 98(2) is undermined and the time and expense of a public hearing is unavoidable.

This is exactly what happened in this case and, having now heard the union's side of the story through viva voce evidence, we are sure that had this information been on the file when the Board first considered this matter, the hearing at Edmonton would not have taken place.

III

Turning to CPC's challenge to the timeliness of the complaint, this is governed by section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

According to CPC, Mr. Elcombe knew or at least should have known of the circumstances giving rise to the complaint at the time of the arbitration hearing when CUPW withdrew the third grievance and failed to object to the supposed critical evidence going in that caused his grievance to fail. This took place on either November 12 or 16, 1990 when Arbitrator Jolliffe heard the 15-day suspension grievance. CPC submitted that the ninety days for filing the complaint started back then and the complaint was therefore well out of time.

With respect, to use those dates for the purposes of section 97(2), one would have to take a very narrow view of the facts and ignore that the arbitrator did not actually release his decision on these matters until November 11, 1991. This was after the parties had appeared before him briefly on October 21, 1991 to deal with the 20-day suspension grievance. Mr. Elcombe says that he did not receive a copy of the decision until November 21, 1991 and there is no reason to doubt him. Up to then, both CUPW and Mr. Elcombe were still confident that the arbitrator would accept the best evidence which, in their opinion, was Mr. Elcombe's. It was only when it became clear from the decision that Mr. Jolliffe had accepted the employer's evidence that Mr. Elcombe says he realized the effect of the union's actions. This is not an unreasonable claim and, in the circumstances, we are prepared to give Mr. Elcombe the benefit of the doubt and use the date when he received the arbitrator's decision, i.e., November 21, 1991, as the date when he knew of the circumstances giving rise to his complaint. This makes his February 13, 1992 complaint timely. (For another example of the Board using the

receipt of an arbitrator's decision as the critical date for the purposes of section 97(2), see David Mullin (1991), 91 CLLC 16,015 (CLRB no. 852)).

IV

Aside from the withdrawal of the third grievance which we shall deal with separately, the main thrust of this complaint clearly goes to the quality of the union's representation before an arbitrator which is an area of labour relations where the Board has a very limited role. In fact, in a recent case where the conduct of a trade union before an arbitrator was before this quorum of the Board, we expressed doubt about the Board having any jurisdiction at all to interfere with the decision of the arbitrator once a matter had gone to arbitration:

"As for the merit of the complaint, we repeat that what Mr. Walker complains about is something that this Board has little or no jurisdiction over. Granted, in Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376), the Board did say that it had a very limited role to play in assessing the quality of representation at arbitration and it said that it would only intervene where there were extraordinary circumstances. Since then, however, even that very limited role has been thrown in doubt by the decision of the Supreme Court of Canada in Réjean Gendron and Municipalité de la Baie-James [1986] 1 S.C.R. 401. There, taking great pains to acknowledge the jurisdiction of tribunals such as this Board to refer a matter to arbitration where a bargaining agent has wrongfully decided not to proceed with a grievance to arbitration, the Court found that the Quebec Labour Court could not use its duty of fair representation remedial powers to order an employee's grievance to be re-arbitrated once it had already been dealt with by an arbitrator. Taking into account the intended finality of an arbitrator's decision under Part I of the

Code, it seems to us that the Supreme Court of Canada's ruling in Réjean Gendron, *supra*, would probably apply equally to this Board."

(John Walker v. Canadian Brotherhood of Railway, Transport and General Workers, Board file 745-4210, Letter Decision no. 1044 dated June 10, 1992 at pages 3-4)

Here, none of the parties to this complaint argued that point, therefore, we are content to leave that question for another day. In the meantime, we shall look at the merit of Mr. Elcombe's complaint within the framework of the policies set out by the Board in Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376):

"It would be a clear case of the tail wagging the dog if this Board were to effectively quash arbitration awards because we disapproved of the manner in which a union presented a grievance at arbitration. We do not consider it to be within the purview of our role or responsibility to evaluate the competence of union representatives or their counsel. Nor do we consider it to be compatible with the public policy purposes and objectives of party controlled compulsory grievance arbitration as a substitute for mid-agreement work stoppages expressed in section 155 of the Code (now section 57) (see the discussion in James E. Dorsey, 'Arbitration Under the Canada Labour Code: A Neglected Policy and an Incomplete Legislative Framework' (1980), 6 Dalhousie L.J. 41). The duty of fair representation has a role under the Code but it must have its limits. That limit falls short of an avenue of appeal from arbitral decisions based upon a judgement by this Board's legal and non-legally trained members about the competence and performance of union representatives and their counsel.

Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board

will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings."

(pages 50-51; 214-215; and 15,433-15,434; emphasis added)

In the circumstances before us here, even if we did have jurisdiction, there are simply no extraordinary circumstances that would warrant the Board's interference in the arbitration process. The testimony of Mr. Gordon Fischer, CUPW's representative who assisted in the presentation of Mr. Elcombe's grievances before Arbitrator Jolliffe, more than satisfied us that the union acted in good faith and that its strategy was sound, albeit unsuccessful. There was certainly nothing arbitrary or discriminatory about the manner in which the union represented Mr. Elcombe and there was no hint of hostility of any kind by the union towards Mr. Elcombe. He apparently sat right there with the union representatives throughout the arbitration hearing with every step of the way being discussed with him.

As for the allegation that the union failed to provide competent and knowledgeable counsel, we would point out that whether a union decides to hire legally trained persons to present a case at arbitration or to go with their own experienced representatives has absolutely no bearing on the outcome of a duty of fair representation complaint. The whole concept of grievance-arbitration was intended to provide a forum for the speedy resolution of disputes arising from collective agreements. The process was meant to be informal and much less legalistic than the courts and it is not within the purview of the role of this

Board, in our respectful opinion, to set standards that would require legal representation.

In this particular case, Mr. Fischer's assessment of the effect of the interim award and reliance upon Mr. Elcombe's direct evidence as opposed to CPC's version of his hours of work (which could not even be backed up by time cards) could hardly be faulted. More importantly, these are prime examples of decisions made by union representatives that ought not to be second-guessed by this Board even if the panel hearing the case happens to disagree with how the matter was handled. (We hasten to add that we do not necessarily disagree with the union here). Absent unlawful motives, it is for the bargaining agent to decide how best to handle these situations and section 37 of the Code does not bestow upon this Board a supervisory role vis-à-vis correctness. In the circumstances, this part of Mr. Elcombe's complaint must fail.

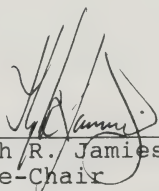
Turning now to the third grievance that CUPW decided to withdraw, it is trite by now to say that bargaining agents do have a considerable discretion whether to proceed with a grievance (see Canadian Merchant Service Guild v. Gagnon et al. (1984), 84 CLLC 14,043 (S.C.C.)). Provided that a decision not to proceed is made in good faith, objectively and honestly and it is not arbitrary, discriminatory or with malice towards the employee(s), a trade union can drop a grievance without running afoul of section 37 of the Code.

Here, Mr. Fischer told the Board candidly that the union decided to withdraw the third grievance and to deal with the issues that this grievance raised through the 15-day suspension grievance. According

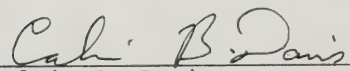
to Mr. Fischer, it was basically the same issues in both grievances and he disagreed with Mr. Elcombe's contention that a separate decision in the withdrawn grievance could have had a bearing on the overall outcome. Again, whether Mr. Fischer was right or wrong is not the question before the Board. What we have to look for are things such as serious negligence, arbitrariness, bad faith or other such unlawful conduct by the union. There being none, Mr. Elcombe's complaint must fail in this regard as well.

In summary, Mr. Elcombe's allegations that CUPW has violated section 37 of the Code are totally unfounded and the Board so finds. The complaint is therefore dismissed accordingly.

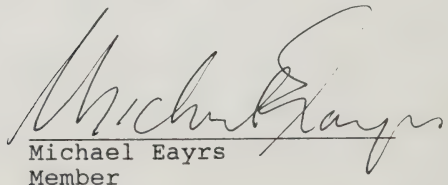
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 8th day of September, 1992.

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SUMMARY

Canadian Council of Broadcast Unions, Applicant, Canadian Wire Service Guild, Local 213 of the Newspaper Guild certified bargaining agent, National Association of Broadcast Employees and Technicians, certified bargaining agent, Association of Television Producers and Directors (Toronto), certified bargaining agent, Canadian Television Producers' and Directors' Association, bargaining agent, National Radio Producers' Association, certified bargaining agent, Alliance of Canadian Cinema, Television and Radio Artists, bargaining agent, Canadian Union of Public Employees, certified bargaining agent, Canadian Broadcasting Corporation, employer, and CBC Managers' Association and Claude Latrémouille, intervenors.

Board File: 555-3324
555-3326
555-3327
555-3328
555-3329
530-1827

Decision No.: 954

Interim Decision

Revised application for the certification of a newly formed council of trade unions. Section 32 of the Canada Labour Code (Part I - Industrial Relations). Application denied.

This case deals with a revised application for certification filed under section 32 by the Canadian Council of Broadcast Unions (the Council) further to Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 926. In that decision, the Board denied the application, but gave the Council the opportunity to review and rethink its proposed constitutional arrangements in light of the principles underlying the restructuring of the bargaining units at the CBC, Canadian Broadcasting Corporation (1991), as yet unreported CLRB decision no. 846. These reasons pertain to the Council's revised Constitution filed with the Board on May 14, 1992.

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RÉSUMÉ

Canadian Council of Broadcast Unions, requérant, Guilde des services de presse du Canada, section locale 213 de la Guilde des journalistes, agent négociateur accrédité, Syndicat national des travailleurs et travailleuses en communication, agent négociateur accrédité, Association of Television Producers and Directors (Toronto), agent négociateur accrédité, Association canadienne des réalisateurs de la radio, agent négociateur accrédité, Alliance des artistes canadiens du cinéma, de la télévision et de la radio, agent négociateur, Syndicat canadien de la Fonction publique, agent négociateur accrédité, Société Radio-Canada, employeur, ainsi que l'Association des cadres de Radio-Canada et Claude Latrémouille, intervenants.

Dossier du Conseil: 555-3324
555-3326
555-3327
555-3328
555-3329
530-1827

Décision n°: 954

Décision partielle

Demande modifiée d'accréditation d'un conseil de syndicats nouvellement constitué. Article 32 du Code canadien du travail (Partie I - Relations du travail). Demande rejetée.

L'affaire porte sur une demande d'accréditation amendée présentée en vertu de l'article 32 par le Canadian Council of Broadcast Unions (CCBU) à la suite de Société Radio-Canada (1992), décision du CCRT n° 926, non encore rapportée. Dans cette décision, le Conseil a rejeté la demande, mais a donné au CCBU l'occasion de réexaminer et de repenser les aménagements prévus à ses statuts, en tenant compte des principes sous-jacents à la restructuration des unités de négociation à la Société Radio-Canada (1991), décision du CCRT n° 846, non encore rapportée. Les présents motifs portent sur les statuts révisés qui ont été déposés auprès du Conseil le 14 mai 1992.

The Board notes that the Council has effected substantial changes to the previous constitutional arrangements, namely with respect to the elimination of any direct reference to the preservation of traditional work jurisdiction lines, and the establishment of a more coherent organizational and operational structure in areas of responsibility pertaining to its role as a bargaining agent. However, its newly introduced article on dues and fees and its companion document Schedule A, which basically sets out the classification boundaries for each of the founding unions, are evidence that the present job classification order at the CBC remains the underpinning of the set of relationships worked out among the constituent unions of the Council. The proposed job allocation system among constituent unions is not bargaining-unit-centered but union-jurisdiction-centered whose effect will be to perpetuate the old work jurisdiction rivalries. The Board also finds that the structure and powers of the Council's Executive Board are consistent with this view of the proposed constitutional order in that a) membership in the Executive Board is limited to the three founding unions; b) the Constitution may be amended only by the unanimous agreement of the founding unions, and c) admission of new members to the Council is to be on terms negotiated by the Executive Board.

In summary, it is the Board's conclusion that the fundamental rationality of the Council's revised constitution is still geared to the current division of work jurisdictions among unions and its preservation over time. The set of constitutional arrangements it devised is largely dysfunctional vis-à-vis the representation needs of CBC employees, aimed as it is at by-passing the bargaining structure determined to be appropriate.

Given these facts the Board dismissed the application.

Le Conseil prend acte des changements significatifs que le CCBU a apportés à ses statuts, notamment en ce qui a trait à l'élimination de toute mention de la préservation des juridictions traditionnelles et à l'adoption d'une structure d'organisation et de fonctionnement plus cohérente en regard de ses responsabilités d'agent négociateur. Cependant, la toute nouvelle clause sur les cotisations et les frais ainsi que le document d'accompagnement, l'annexe A, qui établit les secteurs de compétence des syndicats fondateurs en matière de classification, démontrent que la classification actuelle des postes à Radio-Canada reste la pierre angulaire de l'ensemble des relations établies entre syndicats regroupés au sein du CCBU. Le système proposé n'est pas fondé sur les unités de négociation, mais sur les secteurs de compétence traditionnels des syndicats, ce qui entretiendra les vieilles rivalités entre syndicats. En outre, le Conseil juge que la structure et le pouvoir du bureau de direction du CCBU concordent avec cette façon de voir les choses, en ce sens que seuls des membres des trois syndicats fondateurs peuvent siéger au bureau de direction, que les statuts ne peuvent être modifiés qu'avec le consentement unanime des syndicats fondateurs, et que l'admission de nouveaux membres au CCBU doit se faire aux conditions négociées par le bureau de direction.

En résumé, selon le Conseil, les statuts révisés du CCBU demeurent essentiellement axés sur le partage actuel des compétences syndicales et sur sa préservation à long terme. Les aménagements constitutionnels prévus demeurent largement contre-indiqués à l'égard des besoins de représentation des employés de Radio-Canada, puisqu'ils ont essentiellement pour objet de contourner les unités qui ont été jugées habiles à négocier collectivement.

Vu ces faits la requête a été rejetée.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Council of
Broadcast Unions,

applicant,

Canadian Wire Service
Guild, Local 213 of the
Newspaper Guild,

certified bargaining agent,

and

National Association of
Broadcast Employees and
Technicians,

*certified bargaining
agent,*

and

Association of Television
Producers and Directors
(Toronto),

*certified bargaining
agent,*

and

Canadian Television
Producers' and Directors'
Association,

bargaining agent,

and

National Radio Producers'
Association

bargaining agent,

and

Alliance of Canadian
Cinema, Television and
Radio Artists,

bargaining agent,

and

Canadian Union of Public
Employees,

*certified bargaining
agent,*

and

Canadian Broadcasting
Corporation,

employer,

and

CBC Managers' Association
and Claude Latrémouille,
intervenors.

Board Files:	555-3324
	555-3326
	555-3327
	555-3328
	555-3329
	<u>530-1827</u>

The Board was composed of Mr. Serge Brault, Vice-Chairman, and Messrs. J. Jacques Alary and François Bastien, Members.

These reasons for decision were written by Mr. François Bastien, Member.

This decision constitutes an interim decision under section 20 of the Code by the Canada Labour Relations Board. It was first communicated to the parties on June 29, 1992 in letter decision no. 1039 with the mention that it might be issued at a later date in the form of Reasons for decision.

Appearances

Ms. Suzanne Thibaudeau, Q.C., and Mr. Guy Dufort, for the applicant;

Mr. Paul J. Falzone, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Aubrey E. Golden, Q.C., for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild;

Mr. Robert Dury and Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Mr. David Roberts and Mr. Ronald Pink, for the National Association of Broadcast Employees and Technicians;

Mr. Howard Goldblatt, Ms. Cathy Lace, and

Mr. Jeffrey Sack, Q.C., and for the Association of Television Producers and Directors (Toronto) and the Canadian Television Producers' and Directors' Association;

Mr. David W.T. Matheson, for the National Radio Producers' Association; and

Mr. Claude Latrémouille, on his own behalf.

I

Background

In Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 926, the Board denied the application for certification of the Canadian Council of Broadcast Unions (CCBU or the Council) as constituted. That decision was not challenged. The applicant was seeking certification pursuant to section 32 of the Canada Labour Code (Part I - Industrial Relations). The Board added:

"... the Council and its constituent unions will be given the opportunity to review and rethink their proposed constitutional arrangements in the context of this decision ..."

(pages 27-28)

On the same date, the Board issued letter decision no. 1016, which dealt with the reconsideration of its earlier decision regarding Unit No. 4, i.e. a unit comprising all those whose core functions are of a supervisory nature. The Board determined that such a unit was to be done away with, and the classifications it comprised moved to Unit No. 1. This means that the units for which the Council is currently seeking certification and in which it has members are now (a) the Program Production and Presentation Unit (No. 1), and (b) the Technical, Trades and General Labour Unit (No. 2).

On May 14, 1992, the Council filed with the Board a copy of its Resolution amending its constitution together with a copy of the revised Constitution. Submissions from Mr. Latrémouille, the Canadian Union of Public Employees (CUPE) and the Canadian Broadcasting Corporation (CBC) were subsequently received by the Board on the Council's revised constitutional arrangements, which submissions were replied to on behalf of the Council by Mr. Ron Pink on June 5, 1992. Lastly, a hearing was held on June 18 to hear final submissions and arguments of the parties in this matter.

II

Issue

Decision no. 926 set out in some detail the statutory and case law framework within which the Board has to exercise its discretion under section 32 to certify, or not certify a council of trade unions. In that same decision, the Board reiterated the critical factors it took into account in designing the new unit structure at the CBC, and underlined the strict necessity for any Council structure to address them squarely and appropriately if it was intent on obtaining certification through section 32. It is with these clear parameters in mind that the Board reviewed the constitutional changes made by the Council to determine whether their nature and extent is such that they now satisfy the requirements and the objectives set out in decision no. 926.

III

The Constitutional Changes

The main changes wrought by the Council to its original constitution fall along the following lines:

a) Jurisdiction

Absent from the purpose clauses of the Constitution are now all references to the preservation or maintenance of existing jurisdictional lines. The language of these clauses is now that of career mobility and elimination of disputes among member unions. The jurisdiction clause itself (Article 4) has been changed to reflect the acceptance by the founding union of the "jurisdiction of the Council to act as the bargaining agent for employees of the CBC."

b) Internal Machinery

Key changes in this area include the establishment of a Council Grievance Committee (Article 11) where none existed before, the introduction of a unit-based sub-committee tier for both the Council Bargaining Committee and the Council Grievance Committee, and the authority given to the Executive Board with regard to the assignment of the members of these committees to the respective sub-committees (Articles 8.4 and 11.2). As for the Executive Board itself, if its general powers have remained unchanged (Article 5), it has been given new power to decide the per capita contribution of each member union, and to commit resources from the Council fund to undertake projects of interest to the Council as

a whole (Article 6.4). The Executive Board is also given authority to assign any new or revised classifications to a member union (Article 7.4).

c) Dispute Resolution and Decision-Making

The rule of majority has been substituted to the rule of unanimity in matters such as strike votes, ratification, agreements, the processing of grievances, including classification ones, through to arbitration. This rule extends to both the Executive Board (Article 5.10) and the Council Bargaining Committee. The one exception concerns the constitutional amendment procedure and matters involving disputes over the application or interpretation of the Constitution where the unanimous agreement of all the founding unions of the Council is required. In the absence of agreement among parties in matters involving interpretation and application disputes, the issues will be submitted to arbitration for final settlement (Article 16.4).

d) Dues and Fees

These provisions contained at Article 7 were absent from the original text. Their title notwithstanding, they basically set out the classification boundaries for each of the founding unions along with the terms on which any new or revised classifications shall be assigned to a member union by the Executive Board. Schedule "A", which according to Article 7 is to constitute an integral part of the Constitution, details the current classifications of employees of the CBC so assigned to member unions for the purposes of dues and administration. It should be noted that the job classifications listed in Schedule "A" and those listed in revised Appendix A of the Board's

letter decision no. 1023 are coextensive. In other words, all positions included in the three units deemed appropriate by the Board are now accounted for in terms of their assignment to one of the founding unions.

The method for allocating dues among the constituent unions is identified at Article 7.3 which states that "Council dues for employees in each classification in a bargaining unit shall be remitted to the union which has responsibility for that classification." Disputes over the allocation of Council dues, if not resolved by agreement, will be referred to arbitration as per the terms of Article 16 referred above. Inter-union movement has also been eased to the extent that, when a member of a union transfers to a classification which is assigned to another union, he/she is entitled to membership in that union without being required to pay initiation fees (Article 7.6).

IV

Parties' Submissions

CCBU's position is in essence that its revised constitution addresses all of the Board's concerns as expressed in decision no. 926. Any reference to the preservation of the jurisdictional status quo has been eliminated; none of the founding unions hold veto power any longer over matters of critical labour relations interests such as strike votes, ratification, collective agreements and processing of classification grievances; and all the changes relating to CCBU's internal machinery, dispute resolution mechanism and decision-making process now enable it act as a full-fledged

bargaining agent. The maintenance of a classification-based system of dues and administration relates to the legitimate need of the member unions to continue to service the members they represent with their unique expertise. The set of constitutional arrangements now in place will put an end to years of inter-union jurisdictional rivalries. Any remaining classification disputes will be matters for negotiations with the employer not among bargaining agents.

According to CUPE, the revised arrangements fail to address properly the issue of intra-bargaining unit jurisdictional disputes. For instance, the announcer-operator position, which the Board had determined should be included in Unit No. 1, is under Schedule "A", and for dues and administrative purposes, now assigned to NABET's the National Association of Broadcast Employees and Technicians set of positions. In addition, nothing in the revised certification will prevent the constant shifting of union allegiance on the part of employees based on the particular area of work to which they happen to be assigned. CUPE also submits that the scope and importance of the changes made to the original constitution add weight to its earlier arguments concerning the status of the Council as a properly constituted body, and the total lack of membership consultation in the process of constitutional change at the CCBU, at least as far as NABET and the Canadian Wire Service Guild (the Guild) are concerned.

The Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) restated its earlier position opposing this application. Counsel insisted it lacked proper membership ratification, a fact sufficient to warrant dismissal.

The Board also considered submissions from the CBC. Section 32, as opposed to section 24, gives the Board discretion to allow or to refuse such an application. Section 41 allows an employer to seek the revocation of a council that no longer meets its conditions of certification. This warrants in our view the standing of the employer at the time of certification, albeit not necessarily on every issue raised.

CBC's position is that the constitutional changes put forward by the CCBU are cosmetically different but still structurally consistent with the Council's original intent to perpetuate the old jurisdictional order. Schedule "A" and the work jurisdiction breakdown it provides bear testimony to this state of affairs. Classification disputes will continue to abound under this scheme, the very situation the Board sought to eliminate in Canadian Broadcasting Corporation (1991), as yet unreported CLRB decision no. 846.

V

Analysis

The context of decision no. 926 within which the Council was offered the opportunity to review and rethink its constitutional arrangements is two-fold:

- a) the Council's constitutional regime, as reflected through its purpose clauses, organizational and internal decision-making process traits, was clearly dedicated to the preservation of traditional work jurisdiction lines;
- b) any Council-type structure would need to take real account of, and give full institutional effect to the basic issues the restructuring of the bargaining units at the CBC was meant to address.

This, in a nutshell, is the test identified by the Board in decision no. 926 as the one to be applied to the CCBU's Constitution. And it is still against the same requirements that the Board has to determine whether it should exercise its discretion under section 32 of the Code to grant or to deny the certification application.

The focus of most of the constitutional changes made by the Council is the first set of the Board's concerns just referred to. Indeed, counsel for CCBU did in argument point to the listing of constitutional deficiencies identified by the Board at page 25 of decision no. 926 as the basis for the amended text. On that point, the Board readily recognizes that the Council has effected substantial changes to the previous arrangements, namely with respect to the establishment of a more coherent organizational and operational structure in important areas of responsibility pertaining to CCBU's role as a bargaining agent. The significance and scope of these changes do seem to go beyond the cosmetic as the above review indicates. But there remains the question of whether these changes however important amount not only to a necessary condition being met but a sufficient one

as well. What is decisive is their likely effect on the effective functioning of the Council, something on which a look at its overall operative clauses should shed some light.

The newly introduced article on dues and fees and its companion document Schedule "A" are revealing in a number of respects. After close examination we find that they clearly establish the present job classification order at the CBC as the centrepiece, or better the underpinning of the set of relationships worked out among the constituent unions of the Council. This is based on the fact that the assignment of members to each "founding" union is traditional union-jurisdiction-centered and not bargaining-unit-centered. The treatment of the announcer-operator is a good example. That position, currently a NABET position whose inclusion in Unit No. 1 was at issue, was put by the Board in Unit No. 1 where NABET has all but no members. Yet the Council has placed it in NABET's grouping. This is but one of a number of examples of how this scheme is meant to work in practice.

The method for assigning new or revised classifications is of the same ilk in that the key reference will be to the traditional core jobs of each founding union, and not the core functions, the intended scope of a given bargaining unit. The distribution of non-constituent union classifications between the Guild, NABET and the producers' unions, as reflected in Schedule "A", provides a clear indication of the actual working of this method.

The voluntary resolution of a dispute concerning the allocation of Council dues (an obvious traditional jurisdictional dispute under a new name) requires agreement of all members of the Executive Board failing which it is referred to arbitration. The rule of unanimity as applied here points to the centrality of the preservation of the jurisdictional status quo in the whole of the Council's constitutional arrangements. More on this aspect later in relation to the particular role of the Executive Board.

The union jurisdictional status-quo-centered approach vis-à-vis the administration of the collective agreement leaves largely unresolved the central issue of which union, if not bargaining agent, should represent employees performing multifaceted jobs. Currently, they have to do it under different contracts (e.g. performer, researcher, producer, announcer) held simultaneously by competing unions (see evidence of Ms. Medina or Ms. Chilko). Counsel for CCBU claims that this is merely a job classification issue between the CBC and the bargaining agent, in the sense that the core function would still need to be determined irrespective of who the bargaining agent is, be it a council or a single union. Again, this is not an intra-unit jurisdiction issue but a core job classification one, of the type that will ultimately be resolved, according to counsel, through collective bargaining.

With respect, the Board disagrees. Underlying the creation of Unit No. 1 is the notion that employees of the CBC so engaged perform in a fast-changing environment in terms of production, performance, and technology. The net effect is to render obsolete a good number of job classifications and to blur traditional jurisdictional

lines. The reality is that employees are increasingly moving between jobs, and that these jobs are multifaceted. The industrial relations structure and the bargaining units in order to be appropriate have to respond to this reality. The point in having an integrated program presentation and production unit is inter alia to ensure that the Ann Medinas of the CBC have integrated, coherent union representation irrespective of how classification issues are finally resolved, whether through negotiations or otherwise, whenever the work performed falls within a single unit.

The fact of the matter is that under the CCBU-proposed scheme there exists no mechanism to even recognize, let alone resolve, intra-unit jurisdiction disputes such as the one just referred to. Indeed, their very existence is all but denied. And yet the constitutional structure envisaged by the Council preserves in fact their perpetuation. To suggest, as did the counsel for CCBU, that these issues now exist only as bargaining issues is in effect moving the battlefield when it is questionable whether there should be any intra-unit battle at all. That there is one, and likely will be in the future relates not to the existence of a council, but rather to the presence of a number of different unions competing within a single bargaining unit. What further complicates the matter is that each of the founding unions is entitled through its guaranteed membership in the Executive Board to partake in those so-called classification assignment decisions. For instance, why should NABET whose representation in Unit No. 1 is marginal be given an equal say in the broad affairs of Unit No. 1 and, inversely, the other unions vis-à-vis Unit No. 2 where all classifications are NABET's? The only sensible answer is that this is a suitable mechanism

to address that paramount concern that all job classifications included in Unit No. 1 or in Unit No. 2, whether current or future, be distributed among the founding unions along their traditional obsolete jurisdictional lines. This is sufficient to find that the applicant has not addressed the decisive concerns raised in decision no. 926. But there is more.

The structure and powers of the Executive Board in matters affecting jurisdictional issues are consistent with our view of CCBU's constitutional order. According to Article 16, the Executive Board shall determine any question between two or more member unions of the Council concerning the interpretation or application of the Constitution or the By-Laws of the Council, which obviously includes matters arising out of Schedule "A". However, membership in the Executive Board is limited to the three founding unions as Article 5.1 stipulates. Similarly, the "Constitution may only be amended by the unanimous agreement of all of the founding unions" (Article 15.1).

Admission of new members to the Council will be on terms negotiated by the Executive Board (Article 12.1). Terms involving any redistribution of classifications would likely be an arduous negotiating item indeed for any newcomers who would also originate from the same broadcasting milieu.

Now, even accepting CCBU's argument that so-called classification issues within the same unit would be matters for negotiations, the Council's negotiating structure itself is skewed toward the same existing obsolete lines of jurisdiction. Indeed, according to the committee structure of the CCBU, responsibility for

assigning members to the Council Bargaining Sub-Committees lies with the Executive Board, not the Council Bargaining Committee itself. And the Bargaining Sub-Committee being bargaining-unit-based will be the one likely to deal with the substance of classification issues under the broad supervisory role of the Executive Board. This type of setup will virtually guarantee that bargaining input in these matters, let alone bargaining outcome, will not pass muster unless it remains consistent with the classification allocation system already in place.

VI

Decision

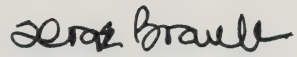
What emerges from the Board's examination of the CCBU's revised constitution is the sense that its fundamental rationality is geared to the current division of union jurisdiction among job classifications and its preservation over time. The set of rules it has given itself makes sense when viewed from that perspective, but much less so when the genuine and challenging representation needs of the strong community of interest present in Unit No. 1 are taken into account, as indeed they should be if the unit restructuring at the CBC means anything. For instance, the Board is not convinced that the announcer-operator needs the unique service expertise of NABET when its dedicated focus as a union will go of necessity to employees of Unit No. 2. What if they wanted to join the Guild? As for employees included in Unit No. 1, they should be allowed to move freely between jobs and assignments without having to look over their shoulder and without having to carry the excess baggage of past and present jurisdictional battles.

In summary, we find that the set of constitutional arrangements devised by the Council are largely dysfunctional vis-à-vis the representation needs of these employees, and that it is aimed indeed at bypassing or undermining the bargaining structure determined to be appropriate. The CCBU structure is unnecessarily complex when one considers that NABET has no real business other than turf protection in Unit No. 1, and the Guild and the producers have even less in Unit No. 2. Evidence of that is found in the effective entry barrier placed on new unions by the exclusive constitutional amending power vested with the Executive Board. The constitutional form given to the current obsolete job classification allocation is further confirmation that the CCBU's structure would not be fitting in the circumstances as these were described in decisions no. 846 and no. 926. The Board is convinced that employees of the CBC, as well as industrial peace would be ill served by CCBU's fractionated, and historically fractious, form of representation.

In conclusion, the Board acknowledges the significant progress achieved by the constituent unions toward building a more co-operative relationship. Efforts should be pursued among all the bargaining agents to identify ways in which the important objectives underlying the realignment of bargaining units at the CBC are given real and effective expression through an adequate structure of representation.

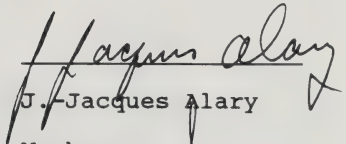
For these reasons, it is the Board's unanimous decision to exercise its discretion under section 32 of the Code, and to dismiss the application of the Canadian Council of Broadcast Unions.

This is a unanimous decision of the Board.



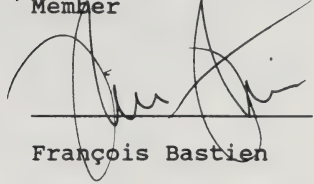
Serge Brault

Vice-Chair



J.-Jacques Alary

Member



François Bastien

Member

ISSUED at Ottawa, this 17th day of September 1992

CLRB/CCRT - 954

information

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RESUME

SYNDICAT DES POSTIERS DU CANADA, REQUÉRANT, MUIR'S CARTAGE LTD. ET SOCIÉTÉ CANADIENNE DES POSTES, INTIMÉES, AINSI QUE J.K. DRIVERS SERVICES INC., MISE EN CAUSE

Dossiers du Conseil:
560-219, 585-339

Décision n°: 955

SUMMARY

CANADIAN UNION OF POSTAL WORKERS, APPLICANT, MUIR'S CARTAGE LTD. AND CANADA POST CORPORATION, RESPONDENTS, AND J.K. DRIVERS SERVICES INC., MIS-EN-CAUSE

Board Files:
560-219, 585-339

Decision No.: 955

Demandes de déclaration d'employeur unique (art. 35 du Code canadien du travail - Partie I - Relations du travail) et de vente d'entreprise (art. 44 du Code) déposées par le Syndicat des postiers du Canada et visant la Société des postes et Muir's Cartage.

Muir's exécute pour le compte de la Société des postes depuis mars 1989 un contrat de ramassage, de livraison et de tri de colis dans la région de Toronto. Elle en a également exécuté deux autres de même nature pour des périodes allant de six mois à un an dans la même région.

The Canadian Union of Postal Workers filed an application seeking a single employer declaration (section 35 of the Canada Labour Code (Part I - Industrial Relations)) and a sale of business declaration (section 44 of the Code), involving the Canada Post Corporation and Muir's Cartage Ltd.

Since March 1989, Muir's has been carrying out a contract to pick up, sort and deliver parcels for Canada Post in the Toronto region. It has also carried out two other contracts of the same nature extending over periods of six months to one year in that same region.



Jurisdiction
constitutionnelle

Le Conseil juge que les activités exercées par Muir's dans le cadre de ses contrats avec la Société canadienne des postes sont du service postal et constituent une partie intégrante de l'exploitation de la Société des postes. Les activités postales de Muir's relèvent de ce fait de la compétence fédérale et le Conseil est en conséquence compétent pour décider du fond des demandes faites en vertu des articles 35 et 44.

Déclaration d'employeur
unique (art. 35)

Rejetée. Le Conseil, même s'il conclut que les faits de l'espèce satisfont aux cinq conditions de l'article 35, décide qu'il n'est pas opportun en l'espèce de faire cette déclaration. La décision de la Société de faire exécuter certains de ses services par Muir's n'a pas compromis les droits de négociation détenus par le syndicat et n'était pas motivée par le désir d'échapper aux dispositions du Code.

Vente d'entreprise (art.
44)

Rejetée. Le Conseil décide que les activités postales de Muir's ne sont pas une entreprise que la Société des postes a transférée à Muir's en tant qu'entreprise active. La plupart des éléments qui constituent l'entreprise postale exploitée par Muir's originent de cette dernière et non de la Société des postes. Il n'y a pas eu de «vente» au sens de l'article 44.

Constitutional Jurisdiction

The Board finds that the work performed by Muir's under its contracts with Canada Post constitutes a postal service and as such is an integral part of Canada Post's business. It follows that Muir's postal operations come under federal jurisdiction, and the Board has the authority to deal with the merits of the section 35 and 44 applications.

Single employer declaration
(s. 35)

The application is dismissed. Even if the Board concludes that the facts in the instant case meet the five conditions of section 35, it decides it is not appropriate to issue a declaration in this case. Canada Post's decision to hand over certain operations to Muir's has not compromised the bargaining rights of the union and was not motivated by the desire to evade its obligations under the Code.

Sale of business (s. 44)

The application is dismissed. The Board finds that Muir's postal operations are not a business that Canada Post has transferred to Muir's as a going concern. Most of the elements that constitute Muir's postal operations originate from Muir's and not from Canada Post. Therefore, there was no sale within the meaning of section 44.

Reasons for decision

Canadian Union of Postal
Workers,

applicant,

and

Muir's Cartage Ltd., *and*

Canada Post Corporation,

respondents.

and

J.K. Drivers Services Inc.,

mis-en-cause

Board Files: 560-219
585-339

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Ms. Linda M. Parsons and Ms. Ginette Gosselin, Members.

Appearances

Mr. James K.A. Hayes, assisted by Ms. Julieann Barrett,
accompanied by J. Crowell, Fourth National Vice-President,
and Mr. Bob Vassileff, Route Measurement Officer,
Scarborough Local, for the Canadian Union of Postal Workers;
Mr. Roy C. Fillion Q.C., assisted by Mr. Brett Christian,
accompanied by Mr. Pierre Carle, counsel, for Canada Post
Corporation; and

Mr. J.P. Wearing, assisted by Mr. Oscar Sala, accompanied by
Mr. Richard Muir, Vice-President, for Muir's Cartage Ltd.
Mr. Michael G. Horan, accompanied by Ms. Jean Kilmartin, for
J.K. Drivers Services Inc.;

These reasons for decision were written by Ms. Ginette
Gosselin, Member.

I

Introduction

This case deals with an application filed on May 1, 1989 by the Canadian Union of Postal Workers (CUPW) under sections 35 and 44 of the Canada Labour Code (Part I - Industrial Relations). CUPW asks the Board to declare that Canada Post Corporation (Canada Post) and Muir's Cartage Ltd. (Muir's) are a single business and a single employer for the purposes of the Code, or to declare that Canada Post transferred a part of its business to Muir's. This application was accompanied by a complaint of unfair labour practice, alleging that Canada Post had violated sections 94(1)(a) and 94(3)(e) of the Code. All these applications are contested on their merits. The Board's constitutional jurisdiction over Muir's is also in dispute.

The original application covered not only Muir's but also 21 other carriers hired by Canada Post to sort and deliver parcels in a number of the country's major centres. Three other applications of a similar nature, covering a total of 8 carriers, were filed during the same period, accompanied by the same complaint of unfair labour practice.

The Board's investigation was spread over several months. On May 17, 1990, the Board decided that the four applications would be combined for the purposes of the investigation and that one joint report would be submitted, but that confidential facts specific to each company would be dealt with in separate reports that would not be transmitted to the Board and to the other companies covered by the application.

The Board's officer submitted a joint report to the Board on June 21, 1990. At that time, 17 carriers were still affected by the proceedings. CUPW had withdrawn its applications with respect to certain companies in a few cases, and the Board's investigation had shown that CUPW's allegations were unfounded with respect to others.

All parties involved asked that a public hearing be held. CUPW also suggested that the Board first conduct a hearing on a test case concerning both the applications and the complaint of unfair practice; then when other cases were heard, only the evidence that differed from the evidence in the test case would be submitted. All respondents except one opposed this approach. After receiving the submissions of all parties on this question, the Board decided on August 17, 1990 that it would hold a separate hearing in each case and that the parties to the first one heard would be Muir's involved in the Metro Toronto area. It also decided that the hearing would deal solely with the section 35 and 44 applications, and that a separate hearing would be held into the complaint of unfair practice. (see Board letters of August 17, 1990 and September 25, 1990.)

A hearing was held at Toronto on October 17, 18 and 19, 1990, January 21, 22, 23 and 24, 1991, April 30 and May 2, May 8 and 9, October 21, 22 and 23, 1991 and February 11, 1992.

II

The Proceedings

The Application

More specifically, the application alleges the following.

1. By letter dated January 13, 1989, Canada Post notified CUPW of its intention to implement an "Expedited Parcel" service. This service was to become effective on February 2, 1989.

2. On or about February 2, 1989, Canada Post entered into an agreement with privately contracted carriers in 19 Canadian centres to implement the Expedited Parcel service. This service, initially available to commercial customers, was extended to include members of the public on an over-the-counter basis on April 3, 1989. This service has the effect of transferring pick-up, sortation, and delivery work previously performed by Canada Post employees within the bargaining unit to privately contracted carriers.

3. The service has been introduced in the following locations.

St John's	Kitchener
Halifax	London
Saint John	Windsor
Winnipeg	Québec
Saskatoon	Montréal
Regina	Ottawa
Edmonton	Toronto
Calgary	Vancouver
Hamilton	Victoria
Moncton	

4. CUPW has been able to identify the following private contractor.

Muir's Cartage Ltd.
8 Golden Gate Court
Scarborough, Ontario

7. It is further submitted that the transfer of pick-up, sortation and delivery of parcel mail is a sale of business or part of a business from Canada Post to Muir's and others, or any of them, within the meaning of section 44 of the Code.

8. In addition, or in the alternative, it is submitted that by virtue of the arrangements entered into on or about February 2, 1989, Canada Post and Muir's and others, or any of them, constitute a single employer within the meaning of section 35 of the Code.

Remedies

1. A declaration that Canada Post and Muir's and others, or any of them, constitute a single employer within the meaning of section 35 of the Code.
2. A declaration that the collective agreement between Canada Post and CUPW apply to Muir's and others, or any of them.
3. In the alternative, a declaration that there has been a sale of business or part of a business from Canada Post to Muir's and others, or any of them, and that the collective agreement between Canada Post and CUPW apply.

The Replies

On the merits, Canada Post and Muir's denied that they were parties to a sale of business or were a single business or a single employer. Muir's, moreover, argued that it was a provincial carrier to which the Code did not apply. It also

argued that it was not the employer of the drivers and sortation employees used in performing its different contracts with Canada Post, since those employees were supplied by personnel agencies, mainly J.K. Drivers Services Inc. (J.K. Drivers), the mis-en-cause. The latter appeared in the case and was represented through counsel at the first two sessions of public hearings but later discontinued attending. J.K. Drivers did not submit evidence.

III

The Facts

The origins

Canada Post has long been in the business of delivering parcels. In 1987 Canada Post decided to try to expand its market share in that business, mainly by increasing its commercial clientele, thus competing with large courier firms such as UPS, Purolator, etc. A Parcel Task Force was set up by Canada Post to study the issue and make recommendations. The measures taken eventually by Canada Post, and which are of interest here, originate from the Expedited Parcel Program (the Program) which mainly focuses on the country's major urban areas. Canada Post's market share of business customer parcel delivery has since then been increasing by approximately 35% annually.

Under the Program, Canada Post offered a new parcel delivery system with features sought by the commercial clientele: speed, tracing, manifesting, etc. This service, which, contrary to the handling of mail, was unregulated, unlike those offered through first-, third- and fourth-class mail delivery, would in fact partially replace those three classes of delivery, which Canada Post now no longer offers.

Businesses that use Canada Post's parcel delivery service can access it either at different postal facilities or at their own facilities. The general public may also obtain this service at the different outlets of Canada Post.

The Expedited Parcel Program set up two parcel delivery systems in the country's 19 largest cities and their outskirts: one for the cities themselves -- Expedited Urban Parcel Service (Expedited) -- and the other to serve the outskirts of those cities -- the Tier Parcel Service (Tier). For this program, Canada Post said it decided to use the private sector for reasons of cost and flexibility. The contracts given to private contractors include part of parcel sortation as well as delivery and pick-up.

Prior to the implementation of the Program and since 1972, Canada Post's own mail service couriers (MSCs) had handled the P & D of parcels in the country's 19 largest centres, as part of their regular Canada Post duties. As early as 1982, Canada Post initiated a special service to its business customers in these centres known as PUFF (pick-up for a fee). This service consisted in MSCs regularly collecting parcels at clients' premises and taking them to a postal facility for sortation and delivery. MSCs were Canada Post employees and members of the Letter Carriers Union of Canada (LCUC). The sortation work was done by Canada Post plant employees who were also members of the applicant.

Outside these 19 large centres, in those communities where the Tier program was later to be introduced, parcels were already picked up and delivered by private carriers referred to as Combined Urban Service contractors or CUS. As to sortation, it was carried out by Canada Post's own employees members of CUPW. (It should be noted in passing that almost

all motorized transport of mail within Canada Post is carried out by the private sector.)

While the Expedited Parcel Program as such did not go into effect until February 1989, parts of it were implemented a year earlier in Metropolitan Toronto (Canada Post's York division). It started with Canada Post serving the new PUFF clientele it could develop in that area through the private sector rather than by way of MSCs. With time, about 25% of the work eventually went to the private sector. In the summer of 1989, the Tier program was launched in the outskirts of Toronto. At the time, it was used for routing what was then known as first-, third- and fourth-class parcels, as the Expedited program was not yet available. It is in that context that Muir's was first awarded a three-month Tier contract.

The Tier Parcel Service

Muir's was awarded two contracts under this program. Muir's was chosen after Canada Post issued a call for tenders from selected contractors. The first contract related to the activities of large Canada Post sortation and processing facilities. First there was the Bulk Mail Facility (BMF) Tier, and went from March 1989 to March 1990, and the second to the Northeast Mail Processing Plant (NEMPP or NE Tier), from October 1989 to March 1990.

In both cases, Muir's employees were to pick up parcels in bulk at one of these two sortation centres in the York Division, bring those parcels to be sorted at Muir's warehouses by Muir's employees, then reload them onto Muir's trucks and deliver them as follows: in the NE Tier contract, either to a Canada Post facility or directly to

the customer; in the BMF contract, only to postal facilities. In both cases Muir's drivers, while making their deliveries, would pick up new parcels at the different postal facilities and bring them back for sorting at Muir's facilities, and then carry them to the BMF or the NEMPP, where Canada Post took them over for their final forwarding. The volume of parcels handled by Muir's under these contracts was significant. It is estimated that some 5000 parcels per day were delivered or picked up by Muir's under the NEMPP contract.

Canada Post terminated this program as well as Muir's Tier contracts in the spring of 1990, alleging it had not obtained the desired results. This caused Muir's to bring an action against Canada Post for breach of contract, a dispute that was subsequently settled out of court.

When Canada Post terminated this program in March 1990, the pick-up, delivery and hauling operations were returned to the CUS contractors which had previously done this type of work, while sortation was returned to Canada Post employees belonging to CUPW.

The Expedited Urban Parcel Service

For the purposes of the Expedited Urban Parcel Service, the Toronto region was divided into three subregions, each under a separate contract with the private sector. Muir's obtained one which it still has.

The terms of Muir's contract have been amended on several occasions, with the most recent version dating from October 1990. Richard Muir, company vice-president, signed the contract on behalf of Muir's, but Canada Post had not yet formally signed it at the time of the hearings. That

contract requires the signature of the president of Canada Post, since it involves an amount in excess of \$1,000,000. Be that as it may, the contract is being performed by both sides, and is, as it were, tacitly renewed every three months. Muir's thus provides pick-up and delivery services in the eastern sector of Metropolitan Toronto.

On the delivery side, this means that at night, Muir's tractor trailers go to the BMF and the NE Plant to pick up parcels already pre-sorted for Muir's routes. They take them to company facilities, where they are further sorted in accordance with specific delivery schedules. The next morning they are delivered by Muir's to either Canada Post's individual customers or to postal outlets. Canada Post also uses MSCs to make unscheduled deliveries under the Expedited program. The Board, visited the BMF plant at the end of the hearings. We were able to see a fairly large enclosure dedicated to Muir's, in which Canada Post employees, after an initial sortation in monotainers put all the parcels destined for the postal codes served by Muir's with one exception, the small parcels, destined to Muir's routes which are kept at the plant to be delivered by regular letter carriers.

In terms of pick-up, Muir's picks up parcels at customers facilities, PUFF or others, and during a certain time, also from various postal facilities, that is post offices, retail postal outlets (RPOs), etc.; it then takes them to its warehouse, where the parcels are sorted by category according to size (machinable, non-machinable, AOs, letters, etc.). It then takes them back to the postal plant for further processing. Since the spring of 1991, the collection of mail (parcels and other mail) by Muir's at the facilities of the postal outlet has been discontinued. Canada Post MSCs, who had formerly been responsible for the

pick-up and delivery of priority post, are now collecting all mail at Canada Post's own facilities.

Muir's handles approximately 7500 parcels daily under this contract.

Muir's Cartage Ltd.

The Muir family has been involved in transportation for over 100 years. It controls a corporate group operating in different sectors. Muir's Cartage Ltd. is one of their companies. It operates in Ontario only, mainly within a 100-mile radius of Toronto.

Muir's shares are held by a holding company, 394531 Ontario Ltd., itself controlled by David Muir and his two sons, Richard and David Jr. Muir's in turn holds 50% of the shares of Muir's International, the other 50% being held by Bruce Trimbee. In the same proportions, the same shareholders own the shares of RHM Transport Inc. which is not involved in these proceedings.

David Muir Sr. is the president of Muir's. Richard is its vice-president and C.E.O. Richard Muir is also a director and officer of RHM and Muir's International. David Muir Jr. has responsibility for the garage, which employs eight mechanics.

Canada Post has no financial interest in Muir's, and no Canada Post officers or employees work for or are directors of Muir's whose employees are not unionized.

Overall, the number of Muir's customers varies from 500 to 700, Canada Post being one of them. For some of these customers Muir's does work similar to what it does under its

contracts with Canada Post, namely the pick-up, sortation and delivery of parcels. For other customers it provides contract carriage services, supplying only drivers and trucks, while the customers otherwise manage their transport activities on their own. But Muir's largest single customer remains Canada Post. In May 1991 the activities and revenues generated by the Expedited contract accounted for some 15% of the total. As for the sortation activities related to Canada Post, they account for 25% of its warehouse activities.

Muir's employs a general manager, an operations manager, three warehouse managers and supervisors. The drivers and sortation employees used by Muir's are officially supplied and employed by J.K. Drivers, the mis-en-cause. On occasion, Muir's may also use other personnel agencies if J.K. Drivers cannot meet the demand.

The drivers wear a Muir's uniform. No employee, whether a truck driver or a warehouse employee, is or has been assigned as such exclusively to the Canada Post contracts. However, owing to the amount of work required, the same persons do the same work on a regular basis.

Muir's uses three warehouses. It owns the Golden Gate Court warehouse it uses for the Expedited parcels contract. Its offices and garage are also located there. Muir's garage is public in the sense that other vehicles besides its own are repaired and serviced there.

Muir's owns almost all the equipment it uses, only monotainers being supplied by its customers. The trucks bear Muir's logo and the customer's logo if the latter so requests. None are identified with Canada Post nor owned by it. As far as maintenance is concerned, Canada Post takes

care of the maintenance of the monotainers and other pieces of equipment it supplied to Muir's.

Under the contracts, Muir's submitted to Canada Post an operating plan as well as delivery and pick-up schedules. Muir's also developed training manuals for its drivers and organized their training program. Of course it also recruited the necessary staff.

Muir's International Ltd.

Muir's International (M.I.) was incorporated in 1986 and is operated separately from Muir's. It holds transport authorities for extraprovincial runs, including in the U.S.A. Bruce Trimbee has always managed M.I. and is its general manager. Before its business dropped off considerably, the company had its own facilities in Downsview -- garages, warehouses and offices. It employed its own office staff, maintained its equipment and did its own accounting, etc. Now Mr. Trimbee manages Muir's International from his home. With the decline in business, operating a garage, an office, etc., was no longer justified. Muir's is not involved in the operations or the management of Muir's International. It merely passes on customers to it on occasion. M.I. is currently doing business with Canada Post, involving two trailers per night from Toronto to Buffalo under a separate contract with Canada Post.

J.K. Drivers Services Inc.

As noted above, J.K. Drivers did not call evidence of its own. It was during Richard Muir's testimony and our visit at Muir's offices that we obtained indirect information regarding this company. The president of J.K. Drivers, Jean

Kilmartin, was formerly Richard Muir's secretary. Around 1982 she decided to create a temporary personnel services agency, at the suggestion of Muir's and with its assistance.

J.K. Drivers has its office at Muir's in the Golden Gate Court facility where Ms. Kilmartin has a desk alongside Muir's office staff. J.K. Drivers employs no supervisor nor foreman, and Ms. Kilmartin is the only person to appear on J.K. Drivers' payroll. When necessary, she uses the services of a consultant, Phil Sunstrom, who provides basic training to new drivers. Muir's is closely involved in the training of sortation employees as well as supplementary training of drivers and more significantly in their supervision. In summary, it appears that J.K. Drivers recruits and formally pays minimally trained drivers and that Muir's looks after the rest.

The Formal Contracts

The contracts concluded between Canada Post and Muir's are for all practical purposes identical, whether they apply to the Tier program or the Expedited program. Under these contracts, Muir's agrees to provide the manpower, materials, equipment and tools necessary to perform the work. Each contract describes each party's respective business, its liability in the event of loss or damage, the modes of payment; it contains rules concerning ways to modify the contract where required, and what to expect in the event of default or cancellation, etc. It has a clause by which the contractor recognizes that the customer list provided by Canada Post remains the property of the latter and that the contractor may only use it for the purposes of the contract and during the life of said contract. Also appended as part of the contract are rates applicable to the different services rendered, as well as an operating plan which is

based on the amount of work to be performed as determined by Canada Post, the planned delivery times etc. Once approved by Canada Post, the operating plan becomes an integral part of the contract. The specifications attached to the contract provide details as to how it is to be administered and performed. In their original version, both the Tier contract and the Expedited contract called for an "arm's length" relationship between the parties. They also state that Canada Post is to produce a training manual for the contractor's drivers and that their training is to be given either by a Muir's employee recognized as competent by Canada Post or by one of their own employees. These two clauses do not appear in later versions of the service specifications.

The specifications also deal with the image to be projected by the contractor's employees, their appearance as well as their equipment. They also identify the monitoring and supervision measures that Canada Post may use to ensure compliance and good performance. Lastly, the specifications set out in detail the procedures to be followed in the handling of mail at all stages where the contractor is involved. These procedures are in one word the same as those followed elsewhere in the postal network including by Canada Post's own staff.

The Expedited Parcel Program

The start-up and implementation of the Expedited Parcel Program was supervised at a number of levels within Canada Post.

When the program was launched in March 1989, the Parcel Services Committee, under the direction of André Veilleux, General Manager, Parcel Business, took on the task of co-

ordinating implementation at the national level. No change could be made to the Expedited program without that committee's approval.

The committee met in Ottawa on a weekly basis until the end of 1990. Throughout that period, it issued, or oversaw the issuance of, directives concerning the services provided and the way in which they were to be rendered. Without listing all of these directives, we would note that among other things, they concern the procedures to be followed by contractors in different situations: carding of residential expedited parcels, CODs, proofs of delivery, bilingual services, stale-dated mail, control of equipment loaned by Canada Post, safety boots, forms to be filled out, etc. The committee also supervised the preparation of information and training manuals to be provided to both Canada Post employees and the contractors. The committee's decisions often amended the specifications attached to the contract. Addressed to the regional managers of the program, these directives were to be transmitted to the contractors to Canada Post employees, to postal outlet employees, etc., in short, to all those involved in the Expedited program. While having ceased to meet weekly, the committee still meets on an ad-hoc basis to continue its supervisory work.

In Toronto, those in charge of the Expedited program met every week for some six months to supervise its implementation in 1989. At the time of his testimony (autumn 1990 - winter 1991), Ed Skrobal was the Manager of the Transportation Contracting Service for Canada Post for York Division. He and his team met every two or three weeks. Generally the managers of Parcel Operations, Service Performance Evaluation, Network Planning and Transportation Operations took part. Depending on the agenda, the Director of Network Operations, the Manager of the Control Centre or

the Sales Manager might attend. Their purpose was to monitor the operations of the Expedited program, note any problems encountered and try to solve them. They were concerned with Expedited mail operations as a whole, contracted or not.

It was Mr. Skrobal who was responsible for negotiating the contracts with Muir's. As Manager of Transportation Contracting Services, he was also responsible for its administration in accordance with the service specifications, which stipulate as follows:

"Transportation Contracting Service's role is to administer this Agreement. Responsibilities shall include, among other things, contractual communications between Canada Post and the Contractor, notification of service specification changes, amendments to this Agreement, and reviews of Contractor performance."

(excerpt taken from Schedule "A" of the Service Specifications issued by Canada Post on October 31, 1990)

In his duties, Mr. Skrobal maintained close contact with Richard Muir or his representatives. Meetings took place on several occasions to fine-tune the monetary conditions set out in the contract as well as Muir's performance.

In addition to their meetings they had numerous written communications. A few of these letters were merely notices from Mr. Skrobal to Muir's concerning changes to procedures or services. As an example, in one such letter Muir's is informed of the time of day at which parcels from postal network facilities are to be delivered to Canada Post's warehouses on Fridays. In another, Ed Skrobal reminds Richard Muir that "any pick-up ten minutes from the scheduled time will be considered a missed pick-up." In another instance, Muir's is informed of the new procedure concerning the carding of residential expedited parcels. A number of these letters make complaints against Muir's and

call for corrective action. For example, on February 9, 1990, Ed Skrobal presented a list of six problems to Richard Muir.

"Transportation Contracting Services
20 Bay Street, Room 611
Toronto, Ontario
M5J 1A1

February 9, 1990

Muir's Cartage Ltd.,
8 Golden Gate Court
Scarborough, Ontario
M1P 3A5

ATTENTION: MR. RICHARD MUIR

RE: EAST URBAN EXPEDITED

The number of problems with regard to the East Urban Expedited contract seem to be multiplying. The following is a short list of some of these problems.

1. Vehicles arriving directly at the NEMPP are offloading mail with virtually no segregation. Registered mail and paper work is not being kept separated.
2. PUFF customers are complaining about missed p/u's, drivers arriving before scheduled p/u times, and also situations where on large volume days drivers have told customers they will return the next day for the balance of the mail.
3. RPO's are being picked up before scheduled times.
4. Arrival profile of 75% by 17:30 and 100% by 18:30 is not being met.
5. Drivers are not uniformed.
6. Some drivers have been identified as drinking on the job.

We cannot tolerate this poor level of service and require immediate action to resolve these problems.

Sincerely,
CANADA POST CORPORATION

(signed)
E. Skrobal
Manager,
Transportation Contracting Services
York Division"

Another example is the letter of January 18, 1990.

"Transportation Contracting
20 Bay Street
Room 611
Toronto, Ontario
M5J 1A1

January 18, 1990

Muir's Cartage Limited
8 Golden Gate Court
Scarborough, Ontario
M1P 3A5

ATTENTION: Mr. Richard Muir

RE: BMF Tier and NEMPP Tier

Dear Sir:

Further to the meeting of January 12, 1990 with Monika Turner and myself, this letter confirms that Canada Post Corporation has not been satisfied with the performance levels provided by your firm with respect to Transportation Services.

As discussed, Canada Post considers the recent performance levels to [sic] a breach of service requirements which Canada Post cannot and will not tolerate.

In order for your firm to continue to provide the service in the immediate term, Canada Post expects that you will take the appropriate steps to ensure that the necessary controls and processes are in place to attain and maintain the level of service performance satisfactory to Canada Post.

Specifically, you must ensure that only qualified, capable and responsible personnel, well versed in handling Canada Post Corporation products are on staff.

In addition, you must demonstrate that improved security measures, quality control processes and monitoring capabilities are in place to ensure complete control in managing Canada Post Corporation requirements at all times.

Canada Post expects that these improvements will be in operation no later than January 19th, 1990 and further Canada Post reserves the right to perform an audit of your operation at any reasonable time.

Furthermore, it is understood that this letter shall serve as formal notice that unless the problem situations are remedied immediately and if service irregularities and/or breach of Canada Post Corporation service standards continue Canada Post Corporation shall avail itself of all rights of termination without prejudice to any

other rights which it may have at law or in equity.

Sincerely,

CANADA POST CORPORATION

(signed)
E. Skrobal
Transportation Contracting Services
York Division"

Ken Rowatt, Manager of Parcel Operations and Integration, also communicated several times with Muir's to point out deficiencies in service or announce new procedures.

In turn, letters from Muir's to Canada Post generally either explain the deficiencies complained of or report on the corrective action taken. In one letter, for example, Muir's informs Monika Turner that a driver was dismissed, at the request of the Manager of Security and Investigation (at Canada Post) and in accordance with company policy, following a joint investigation with Canada Post into an incident involving him. In another letter, Muir's denies that its warehouse was left unsupervised as alleged.

The problems for which Mr. Skrobal or Mr. Rowatt sought correction were usually reported to them by the contract co-ordinator, Larry Gould whose role is set out in the specifications as follows:

"Canada Post shall appoint a Co-ordinator, hereinafter the 'Coordinator', whose responsibilities shall include, among other things, invoice authorization, communication, and service audits. The Coordinator shall also provide the operational interface between Canada Post and the Contractor."

(excerpt taken from Schedule "A" of the Service Specifications issued by Canada Post on October 31, 1990)

Larry Gould, a Canada Post employee at the C&D Parcel

Services Control Centre, was contract co-ordinator until October 1991. Mr. Gould reports to the Director of the C&D Control Centre, as do the letter carriers and MSCs. He summarized his role as follows:

"It was to visit the Contractor, ensure everything that comes [sic] in that day went out that day for delivery."

This meant going to Muir's almost every morning at 7:00 a.m. for a few hours. Sometimes he returned at the end of the day if sortation problems needed to be addressed. During his morning visits he would ensure that the parcels brought in overnight had been properly sorted and that the previous day's work had been completed. He would give instructions or notices to Muir's supervisors regarding problems brought to his attention. Occasionally too he discussed problems with drivers or gave them advice.

The co-ordinator reported to headquarters daily, and filled out a detailed Parcel Services report on Muir's performance. This in turn required that Muir's supervisors give him daily data sheets summarizing all their activities. After his visit, Mr. Gould would handle complaints and any current issues arising from the Muir's contracts.

A note to illustrate Mr. Gould's role. In July 1989, he informed Muir's that its employees needed to wear safety boots when working on the docks at customer or Canada Post facilities. Elsewhere he would inform Muir's of the services required on statutory holidays. In at least two cases he complained about drivers who were later disciplined.

The Collective Agreement

Grievances disputing the use of private contractors to carry

out the Expedited program were filed by the applicant or by the LCUC, which represented the letter carriers and MSCs until January 30, 1989.

These grievances were based on provisions of collective agreements that limit Canada Post's ability to contract out. None of these grievances have ever been referred to arbitration and in at least one case the grievance was dropped altogether. The Board enquired as to why the union had dropped the issue. Basically, the union answered that it considered the matter to be covered by the Code rather than by the agreement. No evidence was adduced of lay-offs or of Canada Post facilities closing following implementation of the program.

IV

The Question of Constitutional Jurisdiction over Muir's

We shall first deal with the Board's constitutional jurisdiction in this matter, since it is a prerequisite to our ability looking into its merits.

The arguments

Muir's argued that it is a provincial carrier and as such is subject to provincial legislation. It further argued that it has not lost its provincial nature as a result of doing business with Canada Post.

The applicant argued to the contrary that Muir's comes under federal jurisdiction. It submitted, firstly, that Muir's International is an extraprovincial carrier and that its corporate ties with Muir's are such that in fact the two companies are one and the same undertaking for the purpose

of constitutional jurisdiction.

Second, CUPW argued that should the Board not accept its first argument about M.I., it should recognize that the activities carried out by Muir's for Canada Post are an integral part of the latter's operations, therefore bringing Muir's under federal jurisdiction.

Decision

The scope of the Code in this regard is defined in section 4.

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

The expression "federal work, undertaking or business" is defined in section 2:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(emphasis added)

These provisions must be read concurrently with the Constitution Act, 1867, in particular with subsection 91(5) which gives the Parliament of Canada legislative authority over the postal service.

The applicant submitted two arguments to the effect that

Muir's is under federal jurisdiction.

The first, based on section 2(b) of the Code, is based on Muir's links with Muir's International. It submitted that in reality they are but a single transportation undertaking that extends beyond the limits of a province.

In our view the evidence does not support such a finding. Muir's International was incorporated in 1986; its existence is separate from Muir's; it has its own permits. The contract to carry mail for Canada Post to the United States is separate and bears its own signature. More importantly, M.I. is managed and operated separately from Muir's. We cannot base federal jurisdiction solely on ownership and corporate ties (Canadian Pacific Railway Company v. Attorney General for British Columbia et al., [1950] A.C. 122; and [1950] D.L.R. 721 (P.C.) (Empress Hotel); Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al., [1983] 1 S.C.R. 733; (1983), 147 D.L.R. (3d) 1; and 83 CLLC 14,048 (Northern Telecom No. 2)). We therefore dismiss this first argument and find that Muir's is in principle a provincial undertaking.

Let us now examine CUPW's second argument. Muir's operations are said to be under federal jurisdiction because they are an integral part of or are necessarily incidental to a federal undertaking, namely the postal service.

In Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529; and [1955] 3 D.L.R. 721 (the Stevedoring case), the Supreme Court set out this well-established and regularly applied principle:

"... If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steam ships, legislation in relation thereto can only

be competently enacted by the Parliament of Canada."

(pages 568; and 759; emphasis added; reproduced in Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRB no. 649) (Shoppers Drug Mart), pages 114; 229; and 14,371)

A host of other decisions followed, some of which stand as landmarks. They are listed and analyzed in Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom No. 1), and we need not recount them. Following his analysis, Dickson, J., as he then was, summarized the proper test to determine whether an otherwise provincial undertaking could become federal and, by way of consequence, its industrial relations fall under federal jurisdiction.

"... First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as 'vital', 'essential' or 'integral'. ..."

(pages 132; 14; and 143)

Drawing on Northern Telecom No. 1, supra, the Board, in Shoppers Drug Mart, supra (decision upheld by the Federal Court of Appeal in Canada Post Corporation v. Canadian Union of Postal Workers, judgment rendered from the bench, file no. A-762-87, January 28, 1988; leave to appeal to the Supreme Court withdrawn), formulated three questions to be answered in making such a determination.

- "1. Is CPC [Canada Post Corporation] a core federal undertaking?
2. Is part of the normal activity of Manly/Shoppers a postal operation and, if so, does this constitute, in whole or in part, an integral part of CPC's business?
3. What is the practical and functional relationship between Manly/Shoppers and CPC?"

(pages 114; 229; and 14,371)

It should be mentioned that in the above case, the Board held that a pharmacy's retail postal outlet activities, carried out under a franchise contract between Canada Post and the owner of the pharmacy were under federal jurisdiction as it was an integral part of the Postal Service.

We consider appropriate to apply the same test in this instance.

1. Is Canada Post a core federal undertaking?

The Constitution gives the Parliament of Canada exclusive legislative authority over the postal service. Under this authority, Parliament adopted the Canada Post Corporation Act, which brought Canada Post into being. It follows that the answer to this first question must be yes.

2. Is part of the normal activity of Muir's a postal operation and, if so, does this constitute an integral part of Canada Post's business?

Let us first see whether part of Muir's normal activity can qualify as being a postal operation.

The Canada Post Corporation Act sets out Canada Post's objectives as follows:

"5.(1) The objects of the Corporation are

(a) to establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;

(b) to manufacture and provide such products and to provide such services as are, in the opinion

of the Corporation, necessary or incidental to the postal service provided by the Corporation; and

(c) to provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that in the opinion of the Corporation, are capable of being conveniently provided in the course of carrying out the other objects of the Corporation."

The Act also stipulates when a thing is deemed to be in the course of post:

"2.(3) For the purposes of this Act, a thing is deemed to be in the course of post from the time it is posted to the time it is delivered to the addressee or returned to the sender thereof."

To fulfill its objects, Canada Post has chosen various means one of which is the collection, transmission and delivery of parcels and Expedited Mail.

Canada Post has long provided a parcel service, and in 1982 they inaugurated a P & D parcel service known as PUFF described earlier. Its employees and private companies have long been associated with providing this service. In 1989, Canada Post changed the names and the features of its different categories of parcels. It also somewhat changed its method of managing its parcel business. Regardless of change, Expedited continued to be part of the regular Canada Post services available throughout Canada and is no doubt part of the postal service if only because it is part of Canada Post activities. Now, all those involved in it -- Canada Post employees and contractors' employees alike -- do so in compliance with CPC's standards and procedures. When Muir's picks up parcels from customers or from various postal facilities, sorts them, manifests them, stores them, delivers them, it does so by following Canada Post procedures every step of the way and from within Canada Post's own system. These parcels remain in CPC's custody

throughout and are processed in the same manner Canada Post employees do it, albeit with different equipment. In doing so Muir's directly contributes to fulfilling the very purpose of Canada Post as defined in the latter's enabling legislation. That participation on Muir's part is extremely regular and closely monitored at all times by Canada Post.

We therefore conclude that a distinct portion of Muir's activity consists in providing a postal service.

Let us now turn to the second part of this question: Are Muir's activities an integral part of Canada Post's operation?

Firstly, Muir's contribution in the overall operation is quite significant, to judge from the nature of the service it gives as well as the number of parcels it handles in a year.

The evidence reveals that the customers served by Muir's are Canada Post customers, never its own. The activities of Muir's take place at various steps in an ongoing wholly integrated process: Muir's employees either receive parcels from Canada Post and sort and then deliver them; or they minimally sort them and deliver them back to Canada Post facilities for further processing. Without the participation of Muir's (or of another contractor), the Expedited program in Toronto would simply not work since Muir's involvement is at its very heart in operational terms. Without Muir's, or another contractor, Canada Post, which decided to maintain and improve its parcel service would either have to provide the service itself using its own employees or to shut it down. That is in fact precisely what it had to do, in part, when it discontinued the Tier contracts. It is also what it did earlier when MSCs were

assigned to the commercial customers of the York division. Indeed, Canada Post could not publicize, let alone sell, a service as its own if it did not make sure that the service is indeed available.

In our review, these reasons show that Muir's postal operations are an integral part of Canada Post operations. Accordingly the answer to the overall query in the second question of the test is affirmative.

3. What is the practical and functional relationship between Muir's and Canada Post?

In practice, the links between Muir's and Canada Post are multifaceted and continuous, as noted above. Each day, Muir's employees are in close operational contact with Canada Post employees and the postal network. On a regular basis their actual work as well as the operational guidelines they have to comply to are monitored and altered by Canada Post. Almost every day, the contract co-ordinator is present at Muir's warehouse. Every day a large number of Muir's employees devote a significant portion of their work, if not all of it, to the operation of the postal service.

Muir's postal operations are totally linked to those of Canada Post and such link is the key to the success of that relationship: when Muir's prepared operating plans for the contracts, it did so in accordance with the hours of operation of the different postal facilities and the delivery schedules established for Expedited mail. Such coordination is essential to the whole scheme. Muir's is a necessary albeit irreplaceable link in the Canada Post chain and in the area that it serves, it is the necessary link between Canada Post and its clientele.

In view of all these facts, we can only conclude, as the Board did in Shoppers Drug Mart, supra, that there exists a practical and functional relationship between the postal service provided by Muir's and that of Canada Post. In consequence, the answer to the third question is also affirmative.

Overall, the work performed by Muir's is an integral part of the effective operation of Canada Post, just as was found in Stevedoring, supra, for the stevedores' activities with regards to the operation of steamship lines. Further their situation is quite comparable to what was held in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., [1975] 1 S.C.R. 178, where the work of M & B Enterprises drivers was determined to be an integral part of the efficient operation of Canada Post. In summary, for constitutional purposes, we see no significant factor that would distinguish this case from the Canada Post Corporation v. Canadian Union of Postal Workers, supra, where the Federal Court of Appeal had this to say:

...

"It is clear the Manly's pharmacy business is provincial; but it is equally clear, in our view that the post office it operates under the franchise agreement is an integral part of the postal service of Canada over which, under subsection 91(5) of the Constitution Act, 1867, the Federal Parliament has exclusive legislative jurisdiction. ..."

(page 2)

We can now turn to the merits.

V

The Section 35 Application: Single Employer Declaration

The first conclusion sought by the applicant is that Muir's and Canada Post Corporation be declared a single employer and a single undertaking pursuant to section 35.

Section 35 of the Code reads as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

Submissions

The applicant claimed that all the prerequisites set out in section 35 are met in the instant case. It further submitted that the labour relations situation prevailing between the parties warrant that the Board exercise its discretion under the same section and make a single employer declaration for the purposes of the Code; CUPW relied mainly on the authority of past decisions of this Board and of the Ontario Labour Relations Board, including The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60); Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRB no. 699); Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771); and R.P.K.C. Holding Corporation, [1986] OLRB Rep. Apr. 828.

Canada Post, with Muir's support disputed the assertion that the evidence supports a finding that the five conditions set out in section 35 are met here. It argued that Muir's and the Corporation are not associated nor related businesses and that there is no evidence of common control or direction between them as required under the Code. It further

contended that if the Board were to conclude otherwise, it would nonetheless not be sound labour relations to issue the declaration sought. According to Canada Post, CUPW's bargaining rights have not been eroded nor are they in jeopardy. It relied on numerous decisions including Canadian Press, supra; Ottawa-Carleton Regional Transit Commission et al. (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRB no. 670), upheld by the Federal Court in Amalgamated Transit Union v. Ottawa-Carleton Regional Transit Commission and Blue Line Taxi Co. Ltd., judgment rendered from the bench, file no. A-110-88, May 2, 1989; The Charming Hostess Inc., [1982] OLRB Rep. Apr. 536; Federated Building Maintenance Company Limited, [1985] OLRB Rep. Nov. 1585; The Corporation of the City of Stratford, [1985] OLRB Rep. June 923.

The Board issued its first landmark decision regarding this section in Canadian Press, supra, in which it described as follows the conditions that could trigger then section 133 into application:

"There are thus 5 primary criteria to be met. First, that the enterprise(s) constitute a federal work, undertaking or business. Second, that there be more than one such work, undertaking or business. Third, that they be 'associated or related'. Fourth, that they be under common control or direction. Fifth, that among the various enterprises under consideration there be 'two or more' that are employers, as defined by the Code in Section 107."

(pages 44; 359; and 441)

With time, the Board came to formulate a two-step test, requiring as a first step that five conditions be met before any single employer declaration could be made.

The Five Criteria of Section 35

For a single employer declaration to be considered, five prerequisites must first be met:

1. two or more enterprises, i.e., businesses,
2. under federal jurisdiction,
3. associated or related,
4. of which at least two, but not necessarily all, are employers (Emde Trucking Ltd., supra),
5. the said businesses being operated by employers having common direction or control over them."

(Murray Hill, supra, page 145)

It follows from our jurisdictional finding that the first two conditions are met in this case: we have two businesses and they are federal. This flows from our earlier determination that Muir's is an integral part of the postal service under federal legislative authority.

According to Canada Post, the third condition is not met. In that regard it suggested that a negative answer should be given to the following questions outlined in Canadian Press, supra, partly on the ground that there is no common ownership between Muir's and Canada Post:

"... To be considered is the degree of interrelationship of the operations of the various enterprises. Do they provide similar services and product? Are they part of a vertically integrated process whereby one business carries out one function, for example, mining ore, and another business, in the organization, processes it? In determining whether the companies are associated or related, the Board would also look into what extent ownership or management of the enterprises are common."

(pages 45; 359; and 441)

We cannot agree that common ownership for instance is a requirement. The approach taken in Canadian Press is not limitative nor exhaustive. The Board clearly did not intend to require that an affirmative answer be given to each of the elements it enumerated. In Ottawa-Carleton Transit Commission, supra, the Board found that the businesses were associated or related owing to the sole fact that OC Transpo and Blue Line Taxi Co Ltd. both provided a transportation service (for the handicapped) which OC Transpo could have

provided by itself. In Murray Hill, supra, the Board made a similar finding given the businesses involved both occupied the same niche in the motor coach transportation field and served largely the same market.

In the instant case, the businesses in question are both -- albeit to differing degrees, of course -- elements of a single totally integrated postal service. It is trite to say that their businesses are interrelated and complementary. As OC Transpo did in Ottawa-Carleton Transit Commission, supra, Canada Post chose to have Muir's take on part of the services it could have provided entirely on its own and to do the rest on its own. There is no doubt in our minds that their activities are indeed associated and related; in fact, they are the same business. We therefore conclude that the third condition is met.

The fourth condition is that at least two of the enterprises involved be employers. Canada Post's employer status is not in question. Muir's does not deny that it employs managerial, supervisory and garage personnel. Yet it does not admit outright that it employs drivers and sorters. They suggest J.K. Drivers does.

In this regard, it is revealing that J.K. Drivers did not submit evidence nor arguments and that Muir's itself did not raise the matter in argument. What emerges from the evidence is that J.K. Drivers does not have the characteristics of an employer. At most, it recruits drivers and sorters under Muir's close guidance, gives them minimal training under the same scrutiny, and Muir's does the rest. As far as the Code is concerned, the only visible effect of the contract between Muir's and J.K. Drivers is to relieve Muir's of the clerical tasks associated with selecting and hiring. In light of all these elements, we

conclude that Muir's is also the employer of the drivers and sorters assigned to operating its postal service. It follows that both CPC and Muir's are employers. The fourth condition is therefore met.

The fifth condition, common direction or control, as in most cases of this nature, is at the heart of the problem: are the enterprises, the businesses, under the common direction and control of these employers?

In the instant case, the very meaning of this fifth condition is in dispute. Counsel for Canada Post argued that it is over the employers, rather than over their businesses, that section 35 requires that common control or direction be exercised. Counsel relied on certain Board decisions to that effect as well as on a minor amendment to the English version of section 35 that was made during the 1985 revision of the federal statute. It is well established that a tribunal should only go about interpreting the language of a statute where that language is indeed ambiguous. Is it the case here?

Let us first look, at the two successive English versions of section 35. Prior to the 1985 revision, section 133, was worded as follows:

"133. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers, having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

(emphasis added)

The current section 35 reads as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

(emphasis added)

The amendment referred to by counsel for Canada Post and adopted in the 1985 revision was the elimination in the English version of the comma between the words "employers" and "having common control." Counsel suggested that this modification to the English version clearly indicates Parliament's will that it be the employers and not their businesses that come under common control. No comments were made by counsel on the French text of section 35.

It is useful to look at the two successive French versions of the same provisions since, contrary to the English ones, they were substantially rewritten in the revision. Prior to 1985, here is how it read in French:

"133. Lorsque le Conseil est d'avis que des entreprises fédérales associées ou connexes sont exploitées par deux employeurs ou plus qui assument en commun le contrôle ou la direction, il peut, après avoir donné aux employeurs la possibilité raisonnable de présenter des observations, déclarer, par ordonnance, qu'à toutes fins de la présente Partie ces employeurs ainsi que les entreprises exploitées par eux que l'ordonnance spécifie, constituent respectivement un employeur unique et une entreprise fédérale unique."

Here is how it reads now:

"35. Le Conseil peut, par ordonnance, déclarer que, pour l'application de la présente partie, les entreprises fédérales associées ou connexes qui, selon lui, sont exploitées par plusieurs employeurs en assurant en commun le contrôle ou la direction constituent une entreprise unique et que ces employeurs constituent eux-mêmes un employeur unique. Il est tenu, avant de rendre l'ordonnance, de donner aux employeurs la possibilité de présenter des arguments."

The jurisprudence cited by counsel goes back to before the 1985 revision. If any doubt can be entertained with regard to the English text, the French texts, old and new, leave very little room for any doubt.

A simple reading of old section 133 in French shows the reason it was amended in 1985. It had a grammatical error in that the verb "assument" was used without a complement. Now it does and it clearly reads that it is the employers that must have control of the businesses as evidenced by the addition of the word "en" and "assument." These two words can only refer to the words "entreprises fédérales" at the beginning of the sentence as being controlled by employers.

The French text is quite clear: it is the enterprises, the businesses, i.e. the activities, that must be under common direction or control, and not the employers, not the persons. With respect, it is also in our view that such is also the meaning of the English text when read in its entirety. We fail to see how the removal of the comma after the word "employers" assuming it is not a typographical error, could have the effect suggested when considered in its context. There is more, a few lines down from that comma we read that the Board may make a declaration "after affording the employers a reasonable opportunity to make representations ... that the ... businesses operated by them ..." This in our view further confirms that it is the undertakings that are subject to common control or direction not the employers.

Even in assuming that the English text could lend itself to a different construction, our interpretation of it is in line with the unequivocal French text. Where there is ambiguity between the French version and the English version of a statutory provision, but where that ambiguity resides

only in one of the two versions while the other version is clear, then the clear version must prevail (Clark v. Canadian National Railway Co., [1988] 2 S.C.R. 680, pages 693-694). The same reasoning was applied in Deputy Minister of Revenue v. Rainville, [1980] 1 S.C.R. 35.)

Finally it is suggested that the amendment made during the 1985 revision of the federal statutes warrants the interpretation suggested by Canada Post. The rules of interpretation are quite clear on this subject. The revised text is not to be considered as a new statute (Bell v. Attorney General (P.E.I.) et al., [1975] 1 S.C.R. 25, pages 28-29). A revised text is deemed to repeal the old statute with respect to form only, without affecting it materially; the rules contained in the old statute continue to apply (Pierre-André Côté, The Interpretation of Legislation in Canada, 2d ed. (Montréal: Les Éditions Yvon Blais Inc., 1991), pages 49-50). We therefore conclude that no reason warrants that we depart from the conclusion drawn from the analysis of old section 133 of the Code that was made in Murray Hill, supra (pages 133-139). It follows that there is proper direction or control where two businesses, operations wise, are determined to be under the common direction or control of two employers. This however does not settle everything. Since Canada Post submitted that even if interpreted as in Murray Hill supra, the fifth condition is still not met in this case. Their main reason is that the relationship between the parties is one of "real contracting out," and that in such cases the Board has refused to recognize that there is any common control or direction by the two employers. They further submit that the usual elements of control and direction identified in case law as being indicia of common control are nowhere to be found in the evidence before us: there is no common ownership, financial support nor any exchange of employees,

of equipment or facilities, nor any common policy on labour-management relations, and no common development plans between Muir's and CPC. Moreover Canada Post would not exert any control over Muir's day-to-day management or longer-term activities nor exercise any managerial or supervisory responsibility with respect to Muir's employees.

The Board's policy on the application of this fifth criteria is not static nor was it meant to be so see Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640). It has evolved over the years, in large part to take into account from the labour relations perspective the wide variety of scenarios that one can witness. In some cases, the emphasis is on elements of common ownership (Canadian Press, supra; and Freight Emergency Service Ltd. (1984), 55 di 172; and 84 CLLC 16,031 (CLRB no. 460)). In other cases, those elements are not found conclusive (G and J Cartage (1987), 70 di 210 (CLRB no. 644). In Ottawa-Carleton Transit Commission, supra), the Board focused on the operational relationship between the businesses.

In Air Canada, supra, the Board reviewed the concepts behind the words "control" and "direction" in an effort to reconcile the different approaches.

"... First, section 35 refers in an alternate manner to both 'control' and 'direction.' If the word 'direction' implies a hands-on type notion, closer to that of day-to-day control, we do not find that such is necessarily the case with the word 'control.' The latter has a broader sense, akin to a more distant, longer-range type of influence.

'control ... power or authority to guide or manage...'

(Philip Babcock Gove, editor in chief, Webster's Third New International Dictionary, Vol. I (Springfield, Mass.: G. & C. Merriam Company, 1971))

'contrôle ... Vérification, surveillance d'une gestion financière. ...'

(Dictionnaire usuel illustré (Paris: Quillet et Flammarion, 1981))

'direction ... The action or function ... of instructing how to proceed or act aright; authoritative guidance, instruction; ... of keeping in right order; management, administration. ...'

(The Oxford English Dictionary, Vol. III (Oxford: The Clarendon Press, 1969))

'direction ... Action de diriger ... Personne(s) qui dirige(nt) une entreprise; bureau du directeur; ensemble des services administratifs dirigeant la marche d'une entreprise: ...'

(Larousse de la langue française (Paris: Librairie Larousse, 1977))

Common direction of the enterprises could probably extend to any issue including trivial matters, whereas common control would likely focus more on general orientation, mid-term and longer-term issues. However, whether we consider the issue from the perspective of control or direction, both will still need to relate to the employers' operations. ..."

(pages 116-117; 269; and 14,097)

While "control" seems to encompass concepts more akin to ownership and financial links, "direction" would seem instead to convey ideas more akin to functional and operational relations. This interpretation probably has the merit of affording a more objective analysis of the fifth criteria of section 35. In turn, it allows for those more subjective factors, such as attitudes and motives, to be considered only at second step of the section 35 test, where the Board is clearly given the discretion to make or not to make a declaration on such considerations.

In the instant case it is clear that there is no common "control" as defined above: no common or shared ownership, no common or shared management in the medium or long term, etc. The relationship between Canada Post and Muir's is strictly based on operations and on business arrangements between them. Thus it is their contracts, and above all the effects of those contracts, that may establish the elements

of common "direction," as defined in Air Canada.

The evidence in effect reveal that Muir's does not direct or run its postal activities alone nor by itself. Canada Post intervenes decisively in almost every facet of the operation. The customers served by Muir's remain those of Canada Post, and Muir's may not take them over. The procedures, policies and operating plan that it applies are either those of Canada Post or Canada Post approved. Muir's cannot change its delivery or collection schedules or routes without the approval of Canada Post. Mail sortation must be carried out in accordance with Canada Post directives and priorities. Canada Post requires Muir's to provide detailed daily reports, and monitors Muir's activities in a variety of ways as well as on a continuous daily basis. It requires Muir's to use only employees who have the knowledge Canada Post deems satisfactory. It also provides Muir's some of the equipment it needs to fulfil its requirements. Canada Post representatives partake in disciplinary decisions affecting Muir's employees. Overall the involvement of Canada Post in the direction of Muir's activities is unescapable, since Muir's is in fact an integral part of Canada Post's operation of the national postal service. We therefore find that the fifth condition is met and that Muir's and CPC are indeed under common direction.

The Board's Exercise of its Discretion

The five prerequisites set out in section 35 being met, we turn to the second step of this test. We must now determine whether it is appropriate to declare that for the purposes of the Code, Muir's and Canada Post are a single employer.

The Board has ruled consistently that labour relations considerations govern this discretion. In Canadian Press,

supra, it stated as follows:

"It should be re-emphasized that the Board has discretionary powers in declaring two or more employers to be a single employer carrying out, for purposes of the Code, a single federal work, undertaking or business. Even if all criteria used by the Board in its evaluation are met, the Board is under no obligation to make such a declaration. The Board's discretion is exercised on the basis of ensuring the rights of employees to be represented by the trade union of their choice in a bargaining structure conducive to 'effective industrial relations' and 'sound labour-management relations'. There may indeed be circumstances where a declaration made possible under Section 133 would be inappropriate and not only not supportive of the objectives of the Canada Labour Code, but contrary to them. If, for example, there were existing bargaining rights which might be infringed upon by the Board exercising its powers or if the impact of such declaration on the parties involved, or indeed other parties, would be demonstrably deleterious, the Board would certainly hesitate to act, no matter what the weight of the evidence concerning commonality of undertaking."

(pages 46-47; 360-361; and 442)

These general objectives have since shaped all subsequent decisions. Section 35 definitely has a remedial function. In British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108), the Board stated:

"... Section 133 allows the corporate veil to be pierced for a fundamental purpose, namely preventing avoidance of responsibilities and undermining rights granted under the Code. ..."

(pages 179; 248 and 340)

In Beam Transport (1980), 74 di 46 (CLRB no. 689), it said:

"One of the industrial relations purposes of section 133 is to discourage employers from escaping collective bargaining responsibilities by, for example, shifting work from one employing entity which is unionized to another, alternative employing entity which is not, where both are under 'common control or direction.'"

(page 48)

As the Board found in British Columbia Telephone Company,

supra, and Air Canada, supra, section 35's purpose is not the expansion but the preservation of existing bargaining rights. Furthermore, it is not aimed at relieving a bargaining agent of its obligation to organize a group of employees otherwise genuinely separate from those it already represents.

In Murray Hill, supra, the Board noted that the motive behind an employer's decision to resort to the use of another employer is decisive in deciding whether a single employer declaration is warranted. Overall, section 35 is there to prevent the erosion of bargaining rights.

Here the evidence showed some sortation and transport activities carried out by Muir's were formerly carried out by members of CUPW. This being said, CUPW members have not been subjected to lay-offs, nor was the Board told of any shut-downs of Canada Post facilities in conjunction with Muir's performing contracts concluded with Canada Post. There is a simple explanation for this: Canada Post's parcel transport operations increased when the Expedited program was launched. This may explain why CUPW has not referred to arbitration any grievances regarding these contracts.

Further, there is no evidence that Canada Post has tried to thwart the provisions of its collective agreements with CUPW. When the Tier program proved ineffective, Canada Post took it back from Muir's, as well as from other contractors. Similarly, Canada Post returned to the MSCs -- members of the applicant -- the operations involved in collecting mail from postal facilities once it became clear that it would be more efficient. Canada Post was obviously looking for efficiency and profitability not the escape of bargaining rights. Failing any conclusive evidence to that effect we

cannot equate such a business concern with an operation aimed at evading its obligations under the Code.

This being so, we conclude that it is not warranted to declare Muir's and Canada Post to be a single employer for the purpose of Part I.

VI

Section 44 application:

Sale of Business

Contrary to the section 35 application, the section 44 application was not the object of as long and detailed submissions. Be that as it may, all parties argued it quite intensely.

Section 44 reads as follows:

"44.(1) In this section and sections 45 and 46, 'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which

the business was sold and that affects the employees employed in the business or their bargaining agent."

The object of this section is well known. Its aim is the protection of existing or newly acquired bargaining rights as well as those rights existing under a collective agreement. The questions that most generally arise in this type of case concern the concepts of business or part of a business and transfer.

The Board has summarized the test to apply in such a case in Halifax Grain Elevator Limited (1991), CLLC 16,033 (CLRB no. 867):

"For the Board to find that a sale of business has occurred, it must answer four questions, logically, in the following order:

1. Is the alleged buyer indeed operating a federal business or going concern?
2. Was the alleged seller indeed operating or otherwise controlling as his own that said federal going concern in whole or in part before the sale took place?
3. Were union bargaining rights in some way tied to the seller's business or part thereof that was presumably sold?
4. Has there been an actual sale or transfer of that same business or part thereof to the buyer?"

(page 14,393)

Regarding the concept of business, the Board, in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), adopted the concept of "going concern" used by the Ontario Labour Relations Board in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193.

"30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a 'going concern', something which is 'carried on'. A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is

what distinguishes a 'business' from an idle collection of assets."

(page 1205; reproduced in Terminus Maritime Inc., supra, pages 185; and 14,239)

This Board went on to say:

"... A business is not merely the sum total of its work functions. It must be viewed in its totality. This 'dynamic' interpretation, which takes into account the evolution of the business and its purpose, leaves room for consideration of its individuality and its particular characteristics which may undergo change, depending on the economic climate. With this interpretation, one can also distinguish more readily between a 'sale' under section 144, a subcontract or the loss of a contract to a competitor. However, unlike the Cartesian approach, it has the disadvantage of not defining any universally applicable criteria. We believe, however, given the individuality and dynamism of each business, that it is better to define a business using an inductive approach, that is, case by case, and leave it to the parties to refer to the precedents we will establish. By considering the totality of a business's activities, we can define more clearly its purpose (Newfoundland Steamships Limited (1981), 45 di 233, and Québec Sol Services Limited [(1981), 45 di 233; and [1982] 2 Can LRBR 369]).

As we stated earlier in reference to Culverhouse Foods Limited and Radio CJYO Limited, we will try, by examining various factors, to determine whether the business, as an organic entity or a part thereof, was carried on by the purchaser."

(Terminus Maritime Inc., supra, pages 186; and 14,240)

It is basically the same concept used by the Supreme Court in UES, Local 298 v. Bibeault, [1988] 2 S.C.R. 1048. Rejecting the so-called "functional definition" of undertaking or business, the Supreme Court ruled as follows:

"Instead of being reduced to a list of duties or functions, the undertaking covers all the means available to an employer to attain his objective. ..."

(page 1105)

The same applies to a part of a business. On that subject, the Ontario Board stated as follows in Metropolitan Parking, supra:

"33. ... In each of these cases the Board found

that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, 'know how' and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. ...

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business', or 'a part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a 'new' business which resembles the 'old' one in many respects. ..."

(pages 1207-1208)

As to the concept of transfer, this Board has long adopted a broad and liberal interpretation:

"Subsection (1) of section 144 does not specifically define what constitutes a 'sale'. The term 'sale' is not defined as such, but it does include 'the lease, transfer or other disposition of the business'. The English text contains the words 'other disposition of the business'. It is clear that the legislator did not intend to restrict the application of section 144 solely to a 'sale' in the commercial sense of the term. Otherwise, there would have been no need to refer to the 'lease, transfer or other disposition of the business'. ...

...

In these circumstances, the method of transfer is not determinative. The fact that the business is transferred by direct agreement between the purchaser and the seller (for example, sale, lease or subcontract) or in a more indirect manner, as in the case of contracts awarded following calls for tenders, is not a bar to the application of section 144. This interpretation, moreover, is consistent with the Ontario Board's interpretation (Clean & Brite Laundry, [1980] OLRB Rep. July 957) and the British Columbia Board's interpretation (Lyric Theater Ltd., [1980] 2 Can LRBR 331, and Interior Diesel and Equipment Ltd., [1980] 3 Can LRBR 563)."

(Terminus Maritime Inc., supra, pages 182-184; and 14,237-14,239)

In the context of section 44 of the Code, the following part of the Supreme Court's decision in Bibeault, supra, is relevant:

"In short, the legislator intended that collective bargaining and the resulting collective agreement take place within the following three-part framework: an employer, his undertaking and the association of employees connected with that employer's undertaking.

It is also clear that when an undertaking is alienated or operated by another in whole or in part, the essential components of this three-part framework must continue to exist if the certification or collective agreement are to remain relevant. ..."

(pages 1101-1102; emphasis added)

This observation is applicable for all the reasons identified by the Board in Canada Post Corporation and Rideau Pharmacy Ltd. (1989), 77 di 85; 1 CLRB (2d) 239; and 89 CLLC 16,019 (CLRB no. 737).

"... As the Court pointed out, there are fundamental differences between the federal and the Quebec statutes and we should not give the Court's decision in Bibeault, with regard to the test as such, and particularly our jurisdiction, an authority that the Court itself expressly did not want it to have.

This having been said, when considering the federal provisions, we cannot rule out the general comments the Court made on the context of successorship provisions in a collective labour relations environment even though these comments were made with respect to the Quebec statute. We cannot rule them out, first, because they deal with the basic mechanism of collective bargaining and, second, because that structure is common to all jurisdictions in Canada."

(pages 104-105; 258-259; and 14,203)

Thus for section 44 to apply, a business or a part of a business must be transferred (sold) to another business, and bargaining rights must have been attached (or must be in the process of being attached) to this business or to that part of it that is being transferred. No one challenges that if any sale has taken place here, it can only be of a "part" of

a business since Canada Post is obviously still in business.

If the parties seem to share the same views as to what is the proper test to follow, they, needless to say, part on its application to the facts on hand.

In Canada Post's opinion, there is no way in which the transactions that took place between it and Muir's can be described as a sale or transfer of business; at the most only work went to Muir's and not any part of Canada Post's business. On CUPW's part, Muir's has acquired from Canada Post a part of a business consisting of its postal service, and this is sufficient for section 44 to apply.

Decision

As far as businesses go, the Board has already determined that Muir's postal operations are a federal "business" for the purpose of our constitutional jurisdiction over Muir's under section 2. Since section 44 defines "business" as a federal business or undertaking as defined under section 2, we would be hard-pressed to determine that such a federal business is not a business for the purpose of section 44. It follows that the union is seeking a declaration that Muir's has "bought," for the purpose of section 44, its postal operations from, or otherwise had them transferred to it by Canada Post.

Canada Post suggested that Expedited Parcels were a new product which as such had never been handled by its own employees. This they argue would mean that since this is a new activity, it was not encompassed by CUPW's certification. If that were the case, then section 44 could not apply here since the business arguably sold was not covered by bargaining rights.

We cannot agree. Whichever way we look at it we find that, at least for our purposes, the pick-up, delivery and sorting of parcels and expedited mail are covered by the scope of CUPW's certification. That is not actually where the main issue lies. The real question is elsewhere. Without repeating in detail the transactions that took place between Canada Post and Muir's, what in essence did the latter actually receive from the former? While it is clear that Muir's is handling postal business it did not handle before, it does not necessarily follow that this business, as a going concern, was transferred from Canada Post. A business is made up of various elements. Muir's did not mushroom overnight. It actually is larger in its non-postal components by a margin of 4 to 1. As was shown before us, much of the Muir's postal undertaking originates within Muir's itself: on the one hand we have the manpower, the material, the equipment, the terminals, etc. Almost all, if not all, that is needed to run its business is its own and it did not come out of Canada Post. Muir's organized the work transferred to it by Canada Post using its own expertise and its own management. Obviously Canada Post is a very big client, but that does not change the fact that Muir's undertaking was already there. Here such factors are not insignificant.

On the other hand, Canada Post handed out its customer list and detailed instructions to ensure that the services would be rendered. There is no doubt that they deal at close range; we have already found for the purpose of section 35 that these two postal businesses were under common direction. Yet nothing has come out of Canada Post that would constitute the "transfer" of a business as a "going concern" for the purpose of section 44. It is only work that Canada Post quit doing. No going concern was transferred. This application is dismissed.

VII

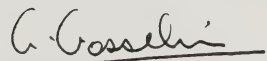
As was said at the outset, CUPW's initial application was aimed at a series of employers and it also entailed an unfair labour practice complaint.

The Board has now ruled on the section 35 and 44 applications with respect to Muir's, a case where the applicant has been asked more or less to put its best case forward, albeit it was not a test case as such.

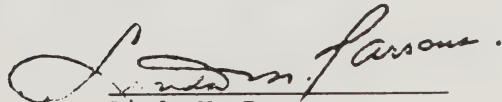
CUPW is directed to inform our Toronto office before October 2nd of its intentions with respect to all other section 44 and 35 applications still pending as well as with respect to its unfair labour practice complaint involving Muir's.



Serge Brault
Vice-Chairman



Ginette Gosselin
Member



Linda M. Parsons
Member

ISSUED at Ottawa, this 17th day of September 1992

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Summary

UNITED STEELWORKERS OF AMERICA,
APPLICANT, AND HUDSON BAY MINING AND
SMELTING CO., LIMITED, EMPLOYER.

Board File: 555-3420

Decision No.: 956

Résumé de Décision

MÉTALLURGISTES UNIS D'AMÉRIQUE,
SYNDICAT REQUÉRANT, ET HUDSON BAY
MINING AND SMELTING CO., LIMITED,
EMPLOYEUR.

Dossier du Conseil: 555-3420

Décision n°: 956

These reasons deal with the validity
of the membership evidence submitted
by the union in support of an
application for certification. In
particular, it was alleged that the
union had refunded the sum of \$5.00
to certain members which was then
used to pay the initiation fee
required by the Board's Regulations.

In its reasons, the Board reviews
this whole question of membership
evidence and recommends more
flexibility in the Board's
application of its Regulations when
dealing with employees who are
organizing for the first time. The
panel suggests that the Board ought
not to be placing artificial hurdles
in the way of employees who are
attempting to gain access to their
fundamental rights to participate in
collective bargaining.

In this particular case, the Board
found that the refund of money by the
union did not taint the membership
evidence for the purposes of
determining the wishes of the
employees affected by this
application for certification.

Les motifs qui suivent portent sur la
validité de la preuve d'adhésion
présentée par le syndicat à l'appui
d'une demande d'accréditation. En
fait, on y allègue que le syndicat a
remis la somme de 5 \$ à certains
membres qui eux s'en étaient servis
pour payer les frais d'adhésion
requis par le Règlement du Conseil.

Dans ses motifs, le Conseil passe en
revue la question de la preuve
d'adhésion et recommande une plus
grande souplesse dans l'application
de son Règlement lorsqu'il s'agit
d'employés qui se syndiquent pour la
première fois. Le banc propose que
le Conseil ne pose pas d'obstacles
artificiels aux employés qui tentent
faire respecter leur droit
fondamental de participer à la
négociation collective.

Dans la présente affaire, le Conseil
juge que l'argent remis par le
syndicat ne compromet pas la preuve
d'adhésion aux fins de la
détermination des désirs des employés
visés par la demande d'accréditation.



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Reasons for decision

United Steelworkers of
America,

applicant,

and

Hudson Bay Mining and
Smelting Co., Limited,

employer.

Board File: 555-3420

The Board was composed of Mr. Hugh R. Jamieson,
Vice-Chair and Messrs. Calvin B. Davis and Michael
Eayrs, Members.

Appearances: (on record)

Mr. Brian Shell, for the applicant.

Mr. Denny Kells, for the employer.

The reasons for this decision were written by
Vice-Chair Hugh R. Jamieson.

I

These reasons deal with the issue of the validity of
the membership evidence submitted by the United
Steelworkers of America (the union or the
Steelworkers) in support of an application for
certification that was filed with the Board on
February 4, 1992. This application sought bargaining
agent status for the Steelworkers to represent a
bargaining unit of office, clerical, technical and
security guard employees of the Hudson Bay Mining and
Smelting Co., Limited (HBM&S or the employer) at its
mining facilities at and in the vicinity of Flin Flon,
Manitoba. The union already represents the production
employees of HBM&S at Flin Flon and nearby Snow Lake.

In its response to the application, the employer raised the issue that the evidence of membership relied upon by the union may not comply with the Board's Regulations. In a submission to the Board dated April 2, 1992, the employer said it had learned that employees who had signed union membership cards more than six months prior to the filing of the application had been asked to sign another card during the six months immediately preceding the date of filing but that they did not pay a second \$5.00. According to the employer's source of information, the union had refunded the first \$5.00 at the time the employees were asked to sign the second union membership card and then accepted the same \$5.00 as payment of initiation fees.

Further submissions to the Board from both the Steelworkers and HBM&S revealed a series of facts and circumstances surrounding the signing of union membership cards and the payment of the requisite \$5.00 which are not really in dispute. For our purposes here, we shall reproduce these circumstances as they are set out in the employer's submission of May 13, 1992:

"Background Facts

By letter dated April 21, 1992, the Applicant's counsel has acknowledged the following:

- 1. Employees who were listed on the Appendix that was enclosed with the letter (the affected employees) paid the required \$5.00 at the time that they signed their initial membership card.*
- 2. The \$5.00 payment was unconditional. Counsel for the Applicant states that:*

'At no time did the applicant union or its collectors or its representatives ever promise or

hold out a promise to reimburse any applicant for membership the five dollars paid by such applicant for membership in the event the applicant union did not apply for certification or for any other reason.'

3. The membership evidence of the affected employees became 'stale' by reason of the expiration of the passage of time.

4. The affected employees were then approached by union representatives in November of 1991 and asked to reapply for membership in the union. The affected employees signed a second membership card but did not pay a second \$5.00.

5. In January of 1992, the affected employees were telephoned by a member of the Applicant's organizing committee to request their consent to have their original \$5.00 payment applied to the second membership card that they had signed. The Applicant's counsel has stated that each of the employees were read the following letter:

'I want to confirm that you understand and agree that the five (\$5.00) dollars paid by you when you signed the first membership card for the Steelworkers on [date] is now being applied to the second membership card for the Steelworkers which was signed on [date]. If you do not understand and agree with the payment of the five (\$5.00) dollars to the second membership card, please let me know.'

The Applicant's counsel has stated that each of the affected employees consented to the request set forth in the above letter.

Such consent was presumably oral rather than written.

6. The Applicant Union subsequently became concerned with the approach that it had taken. Accordingly, in late January and early February, 1992, it delivered a letter to each of the affected employees. That letter is said to have stated as follows:

'Please find enclosed the \$5.00 which is the amount of money you paid to us when you signed an application for membership in the Steelworkers on [date]. As you know, we are now engaged in a new organizing campaign.

The Canada Labour Code Regulation appears to require that \$5.00 be paid within six months of an application. More than six months has past since you initially

signed a card and paid. We are confident of being certified and look forward to working with you to achieve a first collective agreement.

Thank you for your support and co-operation.'

7. The letter was enclosed in a sealed envelope along with a \$5.00 bill. The Applicant's counsel has stated that:

'In each case, the sealed envelope was hand-delivered to the applicant for membership and opened by the applicant for membership. The applicant for membership was asked to read the letter. The applicant for membership was then asked to sign a new membership card and pay \$5.00 as membership/initiation fee. In each case, the applicant collected a new membership card and received \$5.00 on account of membership/initiation paid by the applicant for membership directly to the collector.'

8. Counsel for the Respondent has been advised by the Applicant's counsel that the affected employees numbered between 40 and 45.

9. No information has been provided concerning any employees who might have originally signed a membership card but who refused to sign a second or third card. The Respondent assumes that such employees did not receive a similar payment from the Union, and it requests that the Board investigate further in order to determine if payments were made to such employees."

In its final submission to the Board on this topic dated June 12, 1992, the Steelworkers agreed with those facts and confirmed the assumption by counsel for the employer that no stale-dated membership cards were used for the purposes of the application. The union also confirmed that no refund of \$5.00 had been made to persons who had originally signed and paid but who did not sign second or third union membership cards:

"1. I note that the Applicant and Respondent do not disagree on the background facts which were set out in my letter to the Board dated April 21, 1992 and are reformulated in paragraphs 1 to 9 of the Respondent's submission.

2. With respect to paragraph 9 of the Respondent's submission, I confirm the Respondent's assumption that employees in the bargaining unit who signed a first membership card but who did not sign a second membership card during the period from November 1991 to January 1992 (see paragraph 3 of the Applicant's letter dated April 21, 1992) were not approached in January 1992 to reapply for membership and were not refunded \$5.00.

3. Accordingly, the factual background in this case makes it quite clear that the only persons who received a refund were persons who had initially signed membership cards, had thereafter expressed their continuing support for the Applicant by signing a second membership card and who were then approached in January, 1992 to sign the third membership card and make the \$5.00 payment."

II

The relevant Regulations provide:

"Evidence of Employees' Wishes

23. In any application relating to bargaining rights,

(a) membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; and

(b) membership in a trade union of a majority of employees in a unit appropriate for collective bargaining is evidence that the majority of the employees in the bargaining unit wish to be represented by the trade union as their bargaining agent.

Evidence of Membership in a Trade Union

24. In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person

(a) has signed an application for membership in the trade union; and

(b) has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed.

Confidentiality of Employees' Wishes

25. The Board shall not disclose to anyone evidence that could, in the Board's opinion, reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the Board considers that such disclosure would be in furtherance of the objectives of the Act."

It is well known that this Board relies heavily on membership evidence as an indication of employee wishes in proceedings where the wishes of employees have to be canvassed vis-à-vis the selection of a bargaining agent. The Board's policies and practices in this regard have been well documented and, for our purposes here, we need only refer to a fairly recent decision of the Board in Alberta Wheat Pool (1991), unreported decision no. 907, and the other decisions referred to therein for an overview of the rationale behind this well established practice of the Board.

It is also well known, as the employer reminds us here, that the Board holds trade unions to a high standard of precision and integrity in the gathering and presentation of membership evidence. This was reconfirmed by the Board in July 1990, in Technair Aviation Ltée (1990), 81 di 146; and 14 CLRBR (2d) 68 (CLRB no. 812), where the Board dismissed an application for certification because of what it described as "fundamental irregularities" in the applicant union's membership evidence. These

irregularities included the falsification of employee signatures on membership cards and the non-payment of the required \$5.00 initiation fee. In its reasons, the quorum repeated the caution that had gone out to trade unions operating in the federal domain in K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400).

"The Board is fully cognizant of the importance of proof of union membership and the great weight and reliance placed upon the authenticity of such documentary evidence of employee wishes. Any fraud or tampering with membership cards or records such as signatures, backdated or updated cards, or falsehood in the method of payment of the required initiation fee, will result in swift and severe consequences." ...

(pages 144; and 14,076; emphasis added)

They also repeated what was said in Reimer Express Lines Ltd. et al. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226):

"...By virtue of section 126 of the Code (now section 28), the Board is mandated to place great weight on the wishes of employees as of the date of application as expressed by signed applications for membership complemented by documentary evidence of a monetary commitment. Officers of unions filing such documents are required to attest to their authenticity. In this case, we have evidence of application cards being witnessed by persons who were not present when they were signed. Also, receipts show payment of initiation fees on specific dates, which payment has now been refuted in evidence. This type of conduct cannot be tolerated when the Board relies so greatly on the accuracy of such documents.

Persons dealing with the Board are hereby sternly warned to be aware of the importance of membership evidence. Attempts to deceive the Board in any fashion will not be tolerated. Such improprieties may be fatal to an application."

(pages 226; and 347; emphasis added)

There is of course nothing in this case as serious as fraud or tampering with membership evidence with the intent to deceive the Board. The union's conduct here has been open and above-board. It took certain action to update what it saw as stale-dated membership evidence and, the only question before us is whether the refunded \$5.00 from the initial signing of membership cards can be accepted as the legitimate payment of monies during the six-month period preceding the date of the filing of the application as required by the Regulations.

HBM&S argues that this cannot be allowed and directs our attention to what the Board said on this topic in Radio CHNC Limitée, New Carlisle (1985), 63 di 26; 12 CLRBR (NS) 112; and 86 CLLC 16,009 (CLRB no. 537).

There, the Board was faced with a situation where most of an applicant trade union's membership had paid the required \$5.00 fee before the six month period preceding the filing of an application for certification:

"This is a contravention of s. 27(2) (now s. 24(b)) of the Regulations. This provision is designed to ensure that the time between the signing of a card, the payment of fees, and the filing of the application is kept to a minimum. In short, the point at which the initiation fees are paid constitutes, as it were, the beginning of the period during which the union can seek certification while complying with the requirements of the Regulations respecting payment of dues. This substantive defect alone - and this may not have been the only error in the case - is fatal and warrants the dismissal of this application.

Moreover, the amount collected by the applicant union could not have been deemed to have been paid 'for' the six month period in question and therefore to have met the requirements of s. 27(2) of the Regulations. In this regard, the Board wishes to dissociate itself from a literal reading of this provision, which would deprive it of any significant meaning. Some might be

tempted to argue that five dollars, regardless of when it is paid, could always, without further formality, be deemed to have been deducted 'for' the six month period immediately preceding the filing of an application! For example, a union might have deducted five dollars in 1978 and not have filed its application until 1985 and then simply argued that it collected this five dollars 'for... the...period'. This section of the Regulations will not support this interpretation.

...

The Regulations have allowed unions longer than six months after collecting the dues to seek certification, but at a price, namely more extensive organization work, is required. In that case, the union must collect an initiation fee of more than five dollars which would be deemed to have been collected for a subsequent period to be defined. Thus, a union that seeks to organize very large units sometimes requires more than six months. We recognize this fact, but once again, it will have to persuade its prospective members of this need and ask them to pay dues that will last 'for' more than six months. This is what is meant in s.27(2)(b) by a contribution of five dollars 'for...the... period'. Indeed, this language applies to the few unions whose constitution and by-laws provide expressly for initiation fees of more than five dollars. In such a case, the fees paid are expressly spread over a period of time that is divided into six month segments of five or more dollars each. For example, fees of twelve dollars would be deemed to be payment in advance of two successive contributions of six dollars each, valid for two successive periods of six months each, commencing at the time payment is made. Thus, a sum of at least five dollars is in fact paid 'for' a six month period identified in advance. In short, the levying of the amount is provided for in the constitution and by-laws and it not left to the discretion of the applicant. If it were, it would deprive the requirement in s.27(2)(b) of the Regulations of its meaning. In such a case, the sum of five dollars can never 'cover' more than six months or be valid for a period which is not clearly defined at the time of payment."

(pages 38-39; 125-126; and 14,079-14,080; emphasis added)

For its part, the union's final argument went to the underlying reasons for the monetary commitment required by section 24 of the Board's Regulations.

It submitted that the section is not intended to inhibit a union's organizing efforts or to create unnecessary obstacles. The purpose is only to provide the Board with confirmation that the employees who have signed membership cards truly understand and appreciate the significance of union membership and have confirmed their understanding by a financial sacrifice within a fixed period before the application is filed. According to the union, this has been accomplished in this case.

III

To put this issue in its proper perspective, it is necessary to go to section 28 of the Code wherein lies the Board's duty to certify trade unions as bargaining agents:

"Duty to certify trade union

28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

It can readily be seen from those provisions that once the Board has determined the appropriate bargaining unit, the test then becomes one of employee wishes. We emphasize this because, in other jurisdictions such as Manitoba, Ontario and British Columbia for example, the focus is on membership in good standing. Under their legislation, irregularities in membership evidence are usually fatal to an application. Under the Code, membership evidence is but one method of testing employee wishes. The alternative is to use the ballot box as provided for in section 29(1) of the Code:

"29.(1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."

In its writings on this topic, the Board has made it abundantly clear that it will, unless exceptional circumstances dictate otherwise, use the date of the filing of the application as the date it will satisfy itself whether a majority of the employees in the appropriate bargaining unit wish the applicant trade union to represent them as their bargaining agent. The Board has also said that it prefers membership evidence as opposed to representation votes to satisfy itself as to the employee wishes. (For an overview of the policy reasons behind this preference, see Sedpex Inc. et al. (1985), 63 di 102 (CLRB no. 543), and Alberta Wheat Pool, supra).

The Board's authority to use membership evidence as an indication of employee wishes is of course found in

section 23 of the Board's Regulations which we have reproduced earlier. Section 23 clearly allows the Board to treat trade union membership as an indication of employee wishes for the purposes of applications under Part I of the Code relating to bargaining rights.

Section 24 then sets out what the Board may accept as evidence to establish union membership for this purpose. This evidence consists of signed applications for membership in the applicant trade union (24(a)) and the payment of the minimum of \$5.00 for or within the six month period immediately preceding the date upon which the application is filed, (24(b)). This proof of membership evidence is normally collected from the union by a Board Officer who then submits it to the Board by way of a confidential section in the investigating officer's report. Union officials providing membership evidence in support of an application are required to attest to its authenticity.

Generally speaking, what section 24(b) of the Regulations does is to set a minimum standard of union membership for the purposes of applications to the Board. The signed application to join the union is obviously key. Without the signature on the application card, there can be no consideration of membership. The payment of the token sum of \$5.00, while necessary under the Regulations, is clearly a secondary consideration designed to satisfy the notion that an application to join a union is somehow more binding or that there is a more serious commitment if there is a financial sacrifice.

It is our respectful opinion that too much stress has been placed on the payment of this minimum initiation fee which is really a Board imposed regulatory precondition to the exercise of the fundamental right to participate in collective bargaining under the Code. It is our view that a little more leniency should be shown by the Board regarding compliance with section 24(b) of the Regulations than there has been in the past. As we said, the payment of these monies is clearly secondary to the actual signing of membership applications and the Board must be cautious not to negate employee rights to select a trade union of their choice by taking an overly narrow and restrictive approach when assessing if this part of the Regulations has been complied with.

Having said that, we must make it clear that we do not intend to detract from what has been said by the Board in the past regarding attempts to falsify membership evidence or to deceive the Board in any way. We subscribe wholeheartedly to the notion that attempts to deceive the Board in this regard can result in the dismissal of applications. However, taking into account all that this Board has said in decisions such as Alberta Wheat Pool, supra, about the need to deformatize the process and to relax the rules to afford unorganized employees a realistic opportunity to participate in collective bargaining, it is inconsistent in our view for the Board to be inflexible about how the sum \$5.00 passes from an employee into a trade union's coffers.

Once again, we stress that we have no quarrel with the general approach that the five dollars must be paid

and that it must be paid by the employees on their own behalf. We do, however, have a problem with the idea of dismissing an application because of technical difficulties like we are faced with here over when some of the affected employees actually paid their \$5.00. To dismiss an application for certification on these grounds places too much importance on the payment of money in our respectful opinion and creates an artificial and unnecessary hurdle for employees seeking access to their rights under the Code. Surely, the exercise of employee rights under the Code ought not to depend solely on the payment of a sum of money.

In our view, absent any sort of fraud or attempts to deceive the Board, irregularities of this kind can only convert what would usually amount to an automatic certification into a vote situation. Non-compliance with Regulation 24(a) or (b) only eliminates the Board's options under section 23 to use union membership to satisfy itself of the wishes of the employees. Keeping in mind that the Board's mandate under section 28 of the Code is to satisfy itself of the wishes of the employees rather than to establish membership in good standing, the Board still has its option to order a representation vote under section 29(1) of the Code.

This option between automatic certification based on trade union membership or a representation vote was clearly a consideration in Canada Post Corporation (1990), 80 di 209 (CLRB no. 798). There, another quorum of the Board rejected a motion to dismiss an application for certification because the \$5.00 initiation fee paid in that case was refundable if the

application was not successful. In that case, which was a "raid" situation where the Board's practice is to order a vote where the applicant union can show a fifty plus one percent support by way of membership cards, the Board acknowledged that notwithstanding any irregularities under section 24(b) of the Regulations, the option to order a vote under section 29(1) of the Code would prevail in any event if the application proceeded past the appropriate bargaining unit stage.

We concur with that approach and recommend its adoption, even in non-raid situations. While each case obviously turns on its own particular circumstances, in our view, absent fraud or any kind of tampering with membership evidence, irregularities vis-à-vis section 24(b) of the Regulations ought not to be fatal to an application relating to bargaining rights. At best, such irregularities should only result in the exercise of the Board's powers to satisfy itself of the wishes of the affected employees by way of a representation vote.

We would go even further. If these irregularities are of a technical nature or are correctable, the Board should not be overly concerned and, it should not veer from its practice of using the membership evidence as an indication of employee wishes. This is particularly important when dealing with a group of employees who are exercising their rights under the Code for the first time. Experience has shown that it does not take much to dissuade employees from continuing their efforts to unionize during this extremely sensitive period. One can well imagine the frustration where, for example, in the circumstances

we have here, having signed an application for union membership and paid the required \$5.00 (which they have difficulty understanding the need for in the first place) employees are asked to cough up another \$5.00 because of some technicality in the Board's Regulations. We can think of nothing more detrimental to the achievement of the purposes of the Code.

IV

Turning now to the employer's reliance on the Board's comments in Radio CHNC Limitée, New Carlisle, supra, we would point out that in that rather unique situation, where pressing labour relations considerations prompted the Board to take the rather unusual step of conducting its own investigation into the authenticity of the membership evidence by way of personal in-camera interviews with the employees, there was obviously much more involved than we have here. Admittedly, the bottom line of that decision was that the application was dismissed on the grounds that section 27(2)(b) of the Regulations (now 24(b)), had not been complied with. However, from the scant facts released by the quorum about the results of their interviews with the employees, it is apparent that, unlike here, no initiation fee had been paid at all during the required period by most of the employees claimed by the applicant union as members.

Also, with the utmost respect, we do have a little difficulty with the interpretation of the Regulations in that decision. The whole analysis there appears to

hinge on a misconception of the meaning of the word "for" in 24(b). It seems to us that the word for has little or no meaning when a union is relying on recently signed membership cards.

Bearing in mind what was said earlier about the Regulations setting a minimum standard of union membership for the purposes of the Code, it was necessary to construct section 24(b) as it is written taking into account that applications to the Board relating to bargaining rights affect not only newly organized members but also longstanding members. The use of the words "for or within" are there to maintain a single standard for all membership evidence. However, they have two distinct purposes which we will try to set out as briefly as possible.

At times, the Board is called upon to determine the wishes of people who are longstanding members of the applicant trade union. In fact, many of these people signed their applications for membership so long ago that the unions often have difficulty producing the actual card. These are regular members who pay union dues which are usually assessed monthly. In other words, they pay dues for a specific period. Hence the use of the word "for" in section 24(b). It is intended to cover all of the variations in the practices and methods of paying union dues. This can be done by payroll deduction, personally, or in any other fashion designated by the unions' internal rules. Also, union dues are not always paid during the month for which they are intended. For example, payroll deductions are usually forwarded to the union

by employers after the expiry of the month for which they were deducted. Some members who pay their union dues personally usually do so at the union's monthly meeting. However, there are those who pay in advance and, there are always the delinquents who pay in arrears. Provided that an applicant union can show proof that these members have paid at least \$5.00 for any period of time during the six months preceding the filing of an application, section 24(b) of the Regulations has been met. In practice, monthly union dues by far exceed the minimum amount of \$5.00, therefore, payment of dues for one month during the prescribed period normally satisfies the requirements.

Then, there are the new members of the union who have signed applications for membership during a union's organizing campaign which usually immediately precedes the filing of an application. These persons are not really members in good standing of the union per se and it is not unusual for them to be exempt from paying dues to the union until after a collective agreement is entered into, or at least until certification is obtained. In other words, there is no specific period of time for which they have to pay money to the union. Hence, the word "within" in section 24(b). What the Regulations require is that these people pay the minimum amount of \$5.00 within the prescribed six month period.

In the instant case, we are dealing exclusively with previously unorganized employees who signed applications for membership in the union specifically for the purposes of this application. All of them who signed cards did pay the required \$5.00 within the six months preceding the date the application was filed.

The fact that some of these employees used \$5.00 that had been returned to them from the union does not overly concern us. In our view, it ought not to matter whether employees pay these monies directly out of their own pocket, borrow it from a friend or co-worker, take it from a rebate from Revenue Canada, or as in this case, use a rebate from the union. When assessing whether section 24(b) of the Regulations has been complied with in respect of a longstanding union member, the Board does not delve into the origin of the money used to pay union dues. Nor does the Board investigate how or when individual employers pay membership fees to employers' organizations. Why then should we pay so much heed to where newly organized employees get their money to pay initiation fees?

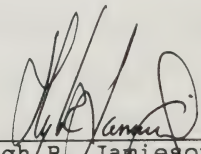
We are in complete agreement with the union here about the intent and purposes of section 24(b) of the Regulations. It is only to confirm that employees who have applied to join the union understand the significance of having signed membership cards. In this case, the employees whose payment of \$5.00 has been cast in doubt, clearly knew what they wanted to do. They signed membership cards three times over a period of several months. This is surely an indication that they were determined to join the trade union of their choice and to exercise their rights under the Code to participate in collective bargaining.

This is not one of those unacceptable situations like the Board described in Radio CHNC Limitée, New Carlisle, supra, where a union might accept \$5.00 from a prospective member and then claim one or two years later that it was for the six month period preceding

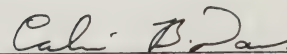
an application. Nor is it a case of the union surreptitiously providing the funds for the initiation fees. Here, after an intensive ongoing organizing campaign, the union checked its membership evidence prior to filing its application with the Board. Realizing that some of the evidence affecting the new members who had signed early on in the campaign might be stale-dated, it took steps to update it. This was done openly and above board with no tampering or updating of receipts. The money that had been retained in the possession of the union organizer was simply refunded to the employees and used for the timely payment of the initiation fee within the time prescribed by section 24(b) of the Regulations. This, in our opinion, does not taint the membership evidence for the purpose of section 23 of the Regulations.

In the particular circumstances of this case we accept the membership evidence tendered by the union in support of the application.

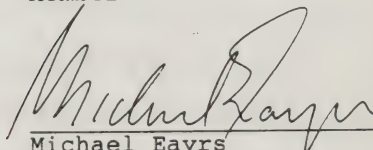
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 22nd day of September, 1992.

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Summary

DAVID COULL, COMPLAINANT, TEAMSTERS
LOCAL UNION NO. 880, RESPONDENT, AND
TRIMAC TRANSPORTATION SERVICES LTD.,
EMPLOYER.

Board File: 745-4010

Decision No.: 957

Résumé de Décision

DAVID COULL, PLAIGNANT, LA SECTION
LOCALE 880 DU SYNDICAT DES
TEAMSTERS, INTIMÉE, ET TRIMAC
TRANSPORTATION SERVICES LTD.,
EMPLOYEUR.

Dossier du Conseil: 745-4010

Décision n°: 957

These reasons deal with a complaint
under the duty of fair representation
provisions pursuant to section 37 of
the Canada Labour Code (Part I -
Industrial Relations) where it is
alleged that the union wrongly
decided not to pursue a dismissal
grievance to arbitration.

The complaint was dismissed as being
without merit and also untimely. In
its reasons, the Board reviews the
standard of representation applicable
in these situations and reconfirms
the latitude enjoyed by bargaining
agents in this area of collective
agreement administration. Once
again, the Board reminds the
community that it does not sit in
appeal from decisions taken by union
representatives vis-à-vis
correctness, nor is it to judge the
quality of the trade union's
representation.

Les motifs qui suivent portent sur
une plainte alléguant que le syndicat
a manqué au devoir de représentation
juste prévu à l'article 37 du Code
canadien du travail (Partie I -
Relations du travail) en décidant à
tort de ne pas donner suite à un
grief jusqu'à l'arbitrage.

La plainte est rejetée parce qu'elle
n'est pas fondée et n'a pas été
déposée dans les délais prescrits.
Dans ses motifs, le Conseil passe en
revue les critères de représentation
applicables dans ce type de cas et
confirme de nouveau la latitude dont
jouissent les agents négociateurs
dans ce secteur de l'application de
conventions collectives. Une fois de
plus, le Conseil rappelle à la
communauté qu'il ne siègera pas en
appel pour juger de l'exactitude de
décisions prises par des
représentants syndicaux et ne se
prononcera pas sur la qualité de la
représentation syndicale.



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Reasons for decision

David Coull,
complainant,

Teamsters Local Union
No. 880,
respondent,

and

Trimac Transportation
Services Ltd.,
employer.

Board File: 745-4010

The Board was composed of Mr. Hugh R. Jamieson,
Vice-Chair and Messrs. Calvin B. Davis and Michael
Eayrs, Members.

Appearances:

Mr. Carl E. Fleck, Q.C., for the complainant;
Ms. Linda Huebscher, for the respondent; and
Mr. Michael P. Schnurr, for the employer.

The reasons for this decision were written by Vice-
Chair Hugh R. Jamieson.

I

In this complaint, which was filed with the Board on
August 27, 1991, Mr. David Coull alleged that the
Teamsters Local Union No. 880 (the Teamsters or the
union), had violated the duty of fair representation
provisions under section 37 of the Canada Labour Code:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The circumstances giving rise to the complaint commenced on or about April 16, 1991 when Mr. Coull was suspended from his employment as a truck driver with Municipal Tank Lines Limited, which is a subsidiary of Trimac Transportation Services Ltd. (the employer). The suspension came after Mr. Coull had admitted falsifying the initials of a mechanic on his daily time record in order to be paid for an extra fifteen minutes. Following an investigation by the employer, Mr. Coull was fired on April 19, 1991.

A grievance was filed by the Teamsters on Mr. Coull's behalf, however, after attempts to have him reinstated failed, the union decided not to proceed to arbitration with the grievance. It was this decision to drop the grievance that Mr. Coull says violates section 37 of the Code.

The union denied that it had breached its duty of fair representation and, following unsuccessful attempts by a Board Officer to assist the parties to settle the matter, the complaint was heard by the Board at Toronto on July 7 & 8, 1992. It should be mentioned that the hearing was first scheduled to take place in March 1992, but that hearing was postponed because of the unavailability of the union.

It should also be mentioned that the Board raised the issue of the timeliness of the complaint at the hearing which required some time for written submissions on this subject after the hearing. The last of these submissions came in on August 11, 1992.

II

At the hearing, the Board heard testimony by Mr. Coull as well as from the union representatives who had handled his grievance. These were Mr. Willie Beauchamp, Shop Steward; Mr. Angus MacFarlane, Business Agent; and Mr. Tom Baldwin, President of Teamsters Local No. 880. Also present at the hearing was Mr. Mike Schnurr who was the employer's Branch Manager at Sarnia at the time of the events surrounding this complaint. Mr. Schnurr did not participate in the hearing, he was there only as an observer to ensure that the true facts were being presented to the Board and to protect the interests of the employer in the event that a remedial order was to be issued.

In most of these duty of fair representation complaints where a grievance has been dropped, the answers to the question of whether section 37 of the Code has been violated lies in the testimony and credibility of the union officers involved. The key considerations are how they viewed the grievance, how they dealt with the grievor, the efforts they made to ascertain all of the relevant facts, how they dealt with the employer, the conclusions reached and, perhaps most important of all, the considerations and reasons for not proceeding with the grievance.

Here, Mr. Beauchamp was the first union official to become involved. As the local shop steward, he had been advised by Mr. Schnurr on April 19, 1991 that a disciplinary interview was about to occur involving David Coull. This was the meeting where David Coull was suspended for having falsified the mechanic's initials on a bill of lading on or about April 16, 1991. Even at this early stage of the proceedings, issues of credibility arose between Coull and the union. For example, Mr. Coull said that he had readily admitted printing the mechanic's initials on a bill of lading to cover some yard time where he had allegedly discussed problems with the lights on his trailer with a mechanic. According to Mr. Beauchamp this admission came after several denials and then only after Mr. Schnurr had informed Coull of the results of his investigation into the matter. After this meeting, Mr. Coull alleged that Willie Beauchamp had expressed his dismay about Coull having confessed. Beauchamp denied this and explained that his consternation was about why anyone would risk his job by falsifying a document over fifteen minutes.

Mr. Beauchamp also stated that Coull had said that the mechanic had given him permission to use his initials any time. He later checked with the mechanic and found this to be false. What the mechanic did tell Mr. Beauchamp though was that he had already told Mr. Schnurr that he did not work on Coull's trailer lights, nor had he initialed the bill of lading. Mr. Coull later denied saying anything about having the mechanic's prior permission to use his initials.

Mr. Beauchamp was also at the second meeting between David Coull and Mr. Schnurr on April 23rd, 1991 where the suspension became a termination. Further credibility gaps appeared here by the different versions of what transpired at this meeting. For instance, the shop steward testified that Mr. Schnurr had handed Coull a letter of termination at this meeting, however, he denied having received such a letter. In fact, David Coull swore that he had not seen the letter until it was provided to him as part of the documents which he received in response to his complaint to the Board.

It was at this stage that Mr. Angus MacFarlane became actively involved. As business agent, he had already been advised by the shop steward that David Coull was in trouble for time theft. He was aware of the suspension and now the termination. On April 24, 1991 Coull and MacFarlane discussed the situation on the telephone and a meeting was arranged for April 26.

Mr. MacFarlane met with David Coull and Willie Beauchamp on April 26, 1991. After going over the circumstances and discussing the possibility of chances of having the termination revoked in lieu of a suspension, a grievance form was prepared for submission to the employer. Also discussed was David Coull's desire to file a second grievance for alleged discrimination. This arose because Mr. Schnurr had apparently made remarks at one of the disciplinary meetings about Coull being one of his most expensive employees. He also said that he took longer than anyone else to do his job. David Coull was incensed by these remarks and he was adamant that a

discrimination grievance should be filed. Angus MacFarlane advised against this. In his opinion, it would only muddy the waters and make it more difficult for him to work out this problem with Mr. Schnurr.

Following some prompting by union President Mr. Tom Baldwin, Mr. Schnurr did meet with Angus MacFarlane where they worked out a deal to reduce the termination of David Coull to a suspension. Mr. MacFarlane testified that he suggested that the suspension should be thirty days which would have meant that it would already be half served. Mr. Schnurr on the other hand insisted on sixty days. No definite length of the suspension was agreed to at this meeting and this question was left to be dealt with at a later meeting which they would have with David Coull. According to Angus MacFarlane, Mr. Schnurr was a very reluctant player in these settlement discussions but he did eventually agree to the deal provided that Coull admitted his wrongdoing and made a commitment about his future good behaviour.

Mr. MacFarlane told the Board that he pushed for that settlement because he had grave doubts about the possibility of succeeding at arbitration with the Coull dismissal grievance. His experience and knowledge of previous rulings by arbitrators on time theft led him to believe that these cases were seldom won. He testified that he also obtained a legal opinion that confirmed his own views about the slim chance of the grievance being successful.

In any event, a meeting was set up for May 8, 1991 and David Coull was told that there was a real possibility of getting his job back. Prior to the meeting,

however, on April 30, Coull again raised the topic of the discrimination grievance. He was of the opinion that this was the last day under the collective agreement to file such a grievance. Again, Mr. MacFarlane attempted to dissuade Coull from filing the grievance. In his complaint, David Coull alleged that he was met with threats and abusive language from MacFarlane during this discussion. In his evidence before the Board he said that Mr. MacFarlane actually banged his fist on the desk. It turned out, however, that this was a telephone discussion and we asked ourselves how Coull could possibly have seen MacFarlane hit his fist on the desk.

In spite of the advice from Angus MacFarlane, David Coull did fill in a grievance form regarding the alleged discriminatory remarks by Mr. Schnurr and filed it through Willie Beauchamp. Mr. Beauchamp testified that he also tried to talk Coull out of filing the grievance, particularly since the proposed settlement meeting had been arranged. Coull was adamant though and Beauchamp decided that he had no choice but to take the grievance and file it.

This takes us to the morning of May 8, 1991 when Messrs. MacFarlane, Beauchamp and Coull met downstairs from Mr. Schnurr's office prior to the meeting that was supposed to start at 8:00 a.m. Again, there were differences in the versions of what transpired. According to David Coull, the union representatives were evasive. He said that they did not tell him that the termination was to be reduced to a suspension if he acknowledged the seriousness of his actions. He could only remember being told that there may be some sort of paper to sign to get his job back. He also

said that they did not mention that he had to apologize to Mr. Schnurr or promise to behave in the future. According to him, he would have done this gladly.

David Coull's version of the meeting was that Mr. Schnurr refused to talk about the dismissal grievance until the discrimination grievance was disposed of. On the advice of MacFarlane, Coull signed off the grievance. In other words, he withdrew it. That done, the focus was on the termination. Mr. Schnurr then asked Coull if he could give him any reasons why he should keep him on instead of hiring someone else. According to David Coull, he addressed a Mr. David Paul, another management person who was at the meeting and said, "you know I always gave you 100% doing my job". Coull claimed that Mr. Schnurr then spoke about a golf tournament and suddenly the meeting was over. Schnurr had not changed his mind and he was still out of a job.

The union representatives had quite a different story. Angus MacFarlane, whose testimony was corroborated by Willie Beauchamp, gave his version of the events to the Board. He said that when they met prior to the meeting, Coull was immediately told what was about to happen, i.e., his termination was about to be reduced to a suspension. MacFarlane was emphatic that there was no mention about signing a paper, nor was there talk about an apology. All Coull had to do was to admit that he had screwed up and promise to behave in the future. To MacFarlane's surprise, Coull was reluctant to take his job back. He said that if he went back to work they would be laying for him and he would not last long on the job. Then he left them to

call his wife and he was on the phone for about half an hour. All this time, Mr. Schnurr was getting impatient upstairs as the meeting was supposed to have started at 8:00 o'clock. At 8:30, at Schnurr's insistence, they got Coull off the phone and went up to the office.

Other than for some insinuations about the amount of pressure applied to David Coull to have him withdraw his discrimination grievance and some questions about whose signature was actually on the signed-off grievance, there was little difference between the parties about the employer's insistence on the disposition of that grievance and how it was withdrawn. From there, Mr. MacFarlane agreed that Mr. Schnurr then asked David Coull if he had any reason as to why he should take him back. According to MacFarlane there was complete silence, Coull did not respond. MacFarlane said he attempted to prompt Coull by saying, "David, don't you have anything to say?" Still silence, then Coull said, "I don't think I have done anything wrong here". At that, Mr. Schnurr said that they are not getting anywhere and the meeting ended. Mr. MacFarlane said that Schnurr told him that he would get back to him in a week.

On May 15, 1991, following an incident where Angus MacFarlane intervened on David Coull's behalf when a prospective employer turned down an application for employment because of a bad reference from the employer, Coull advised MacFarlane that he wanted his grievance to go to arbitration. MacFarlane responded that his case was closed. He explained to Coull that he had legal advice that the grievance was not winnable because of the time theft involved and that

the union would not be proceeding any further. Angus MacFarlane told the Board that he had already cleared this decision to drop the grievance with union President Tom Baldwin prior to this conversation with David Coull on May 15th.

Understandably, David Coull was quite upset. He called a high-ranking Teamster official in Montreal who advised him to take the matter up with Mr. Baldwin, which he did. In this regard, Tom Baldwin testified that when he received a phone call from a very irate David Coull, he called Angus MacFarlane and instructed him to set up a meeting where they could get together with Coull and explain the reasons to him why they had decided not to go ahead with the grievance. This meeting was arranged for June 4, 1991, however, David Coull could not attend at the last minute. A new date was set for June 12, 1991 but again, David Coull backed out the day before the meeting because he was working. No other meeting was arranged and the union did not hear from David Coull again until he filed his complaint to the Board on August 27, 1991.

III

The law regarding a trade union's discretion whether to proceed to arbitration with a grievance is well settled. In Canadian Merchant Service Guild v. Gagnon et al. (1984) 84 CLLC 14,043; and 9 D.L.R. (4th) 641, the Supreme Court of Canada addressed the principles that apply when a bargaining agent is exercising this discretion:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case-law and academic opinion consulted,

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 12,188 and 654)

It is also well settled that where a dismissal grievance is involved, or for that matter, any grievance that could have severe adverse consequences on an employee's employment, a higher degree of diligence is expected from trade union representatives. In these situations, the Board has said that it will apply the standards of fair representation more stringently (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRb no. 304)).

Applying those tests to the circumstances of this case, we are more than satisfied that the union fulfilled its obligations to David Coull vis-à-vis its statutory duty of fair representation under section 37 of the Code. The representatives involved clearly turned their minds to the problem and sought out the truth of the matter. Having determined that they had a loser if they went to arbitration, they used every avenue available to have David Coull returned to work. They struck a deal with the employer and it was only David Coull's stubborn reluctance to play his role and admit that he had screwed up that prevented him from returning to work. Also, his misguided obsession over the supposed discrimination grievance, which he filed against the advice of the union, did little to help his cause.

Zeroing in on the real issue in this complaint, which is David Coull's contention that the union was wrong in concluding that the grievance had little chance of succeeding at arbitration, we would point out that this is an area where the Board has said that it would not second-guess the union representatives who have the responsibility to make these decisions unless there are clear signs of arbitrary, discriminatory or bad faith conduct. In a recent letter decision, Peter Foley, dated July 24, 1992 (LD 1052 - File 745-4202), this quorum of the Board addressed this very issue:

"The rationale for this hands-off approach by the Board needs little explanation. It is, without question, the legitimate role of a bargaining agent under the Code to administer collective agreements on behalf of those it represents. Keeping in mind that in the free collective bargaining system, collective agreements are

administered for the most part by elected or appointed full or part-time union representatives who are seldom legally trained, there must obviously be some discretion permitted in this area as these people go about their daily tasks which include decision-making vis-à-vis the interpretation of collective agreements. Provided that these decisions are made in good faith and without malice or discrimination or other such unlawful motives, this Board will not second-guess the persons who have the responsibility to make these decisions even if it may have different views about how the particular matter should be handled. (We hasten to add that we do not necessarily disagree with the union here)."

(page 4)

There, the Board was speaking about differences of opinion between unions and their members over collective agreement interpretation. However, in our view, these comments are equally applicable to situations like we have here where there is a difference of opinion about the likelihood of winning at arbitration.

Counsel for David Coull provided the Board with a couple of precedents where arbitrators had apparently upheld what he described as similar grievances and argued that the union was wrong in not proceeding to arbitration considering that this was a dismissal grievance. He was clearly of the opinion that the union should have handled the case differently and this is the crux of the whole case. It matters not whether David Coull feels that the union handled his grievance wrongly or even whether we, a quorum of the Canada Labour Relations Board, feel that the matter should have been handled differently. It was the legitimate role of these trade union representatives to decide how to deal with this grievance and, even if

they were wrong, and we do not for one minute say that they were, absent unlawful or seriously negligent conduct on the union's part, there is no redress available to Mr. Coull under the Code. The Board said very recently in Peter Elcombe, unreported CLRB no. 953 dated September 8, 1992, that its mandate under section 37 of the Code does not include a supervisory role vis-à-vis correctness. We repeat that message here. The Board's role under these provisions is not to sit in appeal from these decisions by trade union representatives, nor are we to judge the quality of the trade union's representation. This provision of the Code is intended only to address abuses of the exclusive bargaining agent authority of trade unions and in particular to identify and remedy arbitrary, discriminatory or bad faith conduct. (See Valerie Hertz et al. (1990), 81 di 96; and 90 CLLC 16,055 (CLRB no. 806); and Dave Mullin (1991), 91 CLLC 16,015 (CLRB no.852)).

In this case we see none of those elements. There was nothing arbitrary about the union's decision not to proceed with the grievance. Having all of the facts before them, the union officers formed an opinion about the merit of the grievance based on their knowledge and experience and, they sought verification of that opinion from their lawyer before acting upon it. They acted in good faith throughout and, while there were obvious signs of frustration on part of the union officials over David Coull's response to their advice and to their attempts to have him reinstated, there was certainly no indication of hostility towards him.

Taking all of the foregoing into consideration, we are satisfied that the union acted well within the bounds of its lawful discretion when it decided not to proceed with the grievance to arbitration. The complaint is therefore without merit and it is dismissed accordingly.

IV

Turning now to the timeliness issue which the Board raised at the hearing, much to the concern of counsel for David Coull, who seemed to be rather taken aback when the Board spoke about a possible problem with the timeliness of the complaint. He made much about the fact that no one else had raised this issue and implied that the Board ought not to have done so. It is our view, however, that timeliness is a matter going to the Board's jurisdiction which must be addressed if there are any doubts in this regard even if none of the parties address it. We see no difference between timeliness and, for example, constitutional jurisdiction. Surely, if part way through a hearing, the Board twigs that it may not have jurisdiction over the labour relations of the parties appearing before it, the Board is duty bound to speak up. It is the same with timeliness.

Often, trade unions are reluctant to raise this issue when responding to duty of fair representation complaints from members lest they be seen to be hiding behind technicalities rather than dealing with the substance of the complaint. Our advice is that they

should do both. Timeliness can always be raised as a preliminary matter where there are grounds for doing so with the merit of the complaint being addressed as well. This allows the Board to screen out untimely complaints at the completion of its investigation process thus avoiding the necessity for expensive and time-consuming hearings. (See Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRB no. 515)).

We need not spend much time on this issue as the complaint has already been found to be without merit. Having raised it though, we shall deal with it.

Timeliness of complaints of this nature is governed by section 97(2) of the Code:

"97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Here, it was not until Mr. Coull testified about his encounter with Angus MacFarlane on May 15, 1991 that any concern for this issue of timeliness developed. He was so emphatic that it was on that date he demanded that his grievance proceed and he was just as emphatic that Mr. MacFarlane told him unequivocally on that date that his case was closed. His grievance was going no further. It was then that the alarm bells started ringing as it became clear, at least to the Board, that May 15, 1991 was probably the date when he knew of the circumstances giving rise to his complaint for the purposes of section 97(2). That was why the

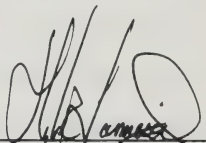
Board spoke up when it did. It would hardly have been fair to Mr. Coull not to reveal our thoughts and not to give his counsel ample opportunity to address this issue.

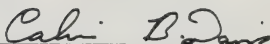
As it has turned out, our intuition was right and, notwithstanding the valiant effort by Mr. Coull's counsel to convince us otherwise, May 15, 1991 was the date that the ninety-day time limit started ticking away. The complaint, which was filed on August 27, 1991 is indeed untimely. Not by very much but nevertheless, untimely.

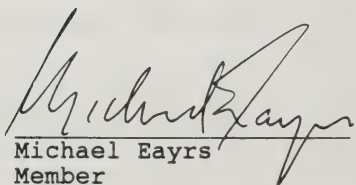
With the utmost respect, we cannot accept the submission that the events that followed May 15, 1991, where David Coull spoke with someone from the union in Montreal and then his further conversations with Mr. Tom Baldwin which resulted in the aborted meetings in June 1991, somehow keeps the time limits open. In this regard, we need only refer to the decision provided by counsel for the union in support of her argument, Donald McIntyre (1987), 72 di 127; 19 CLRBR (NS) 196; and 88 CLLC 16,002 (CLRB no. 665). There the Board canvassed this whole issue of timeliness and reconfirmed earlier decisions which had established that the crucial date for the commencement of the ninety day time limit under section 97(2) is the date upon which the complainant is made aware of the union's decision not to proceed further with a grievance. Subsequent action by the union by way of internal appeal procedures do not extend the time limits. Nor does a later decision by the union to uphold the original decision create a fresh refusal that would trigger new time limits.

In the circumstances before us here, Mr. Coull unquestionably knew on May 15, 1991 from his conversation with Mr. MacFarlane that his case was closed. He was told unequivocally that his grievance was going no further. That is the date upon which his time limits under section 97(2) started running. Not only is his complaint without merit, it is also untimely.

The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair

Calvin B. Davis
Member

Michael Eayrs
Member

DATED at Ottawa this 23rd day of September, 1992.

Information

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Summary

DENNIS C. ATKINSON, EMPLOYEE
APPLICANT, AND VIA RAIL
CANADA INC., EMPLOYER.

Board File: 950-236

Decision No.: 958

A VIA Rail conductor refused to work in certain coaches on a passenger train because, as an asthmatic, he considered he was in "danger", within the meaning of the Canada Labour Code (Part II - Occupational Safety and Health), from cigaret smoke. The conductor's refusal was accepted by VIA Rail.

A safety officer investigated the situation after the train had arrived at its destination. By this time, the smoke had cleared. The officer - in line with recent judgments of the Federal Court of Appeal - conceived his mandate to be to determine whether danger existed at the time of his investigation, not whether it was actually present when the conductor felt the necessity to refuse to work. He ruled that there was no danger.

The Board confirmed his decision, but pointed out that this in no way infringed upon the right of the employee to withdraw his services in the first instance without fear of reprisal when he perceived that he was in danger.

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Résumé

DENNIS C. ATKINSON, EMPLOYÉ
REQUÉRANT, ET VIA RAIL CANADA
INC., EMPLOYEUR.

Dossier du Conseil: 950-236

No de Décision: 958

Un chef de trains de VIA Rail Canada Inc. a refusé de travailler dans certains wagons d'un train de passagers parce que, souffrant d'asthme, il estimait que la fumée de cigarette était un danger au sens où l'entend le Code canadien du travail (Partie II - Sécurité et santé au travail). VIA Rail a accepté ce refus.

Un agent de sécurité a mené une enquête après que le train eut été arrivé à destination. À ce moment-là, il n'y avait plus de fumée. L'agent, en conformité avec des jugements récents de la Cour d'appel fédérale, a interprété son mandat ainsi: déterminer s'il y avait danger au moment de l'enquête, et non lorsque le chef de train a cru bon de refuser de travailler. Il a jugé qu'il n'y avait pas de danger.

Le Conseil confirme la décision de l'agent, mais fait remarquer que cette conclusion n'influe pas sur le droit de l'employé de retirer ses services, sans crainte de représailles, dès qu'il croit qu'il y a danger.



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Reasons for decision

Dennis C. Atkinson,
employee applicant,
and
VIA Rail Canada Inc.,
employer.

Board File: 950-236

The Board consisted of Vice-Chairman Thomas M. Eberlee, sitting as a single member pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Dennis Atkinson, for himself, assisted by Ron Bennett of the United Transportation Union; and
Anne Cartier, for VIA Rail Canada Inc.

I

This case involved a review by the Board of a safety officer's decision pursuant to section 129(5) of the Code. The matter was heard in Toronto on June 29, 1992.

II

Dennis C. Atkinson was working as a conductor for VIA Rail Canada Inc. (VIA Rail) train number 63 running from Montréal to Toronto on March 29, 1992. In two coaches on that train, as apparently on most VIA Rail trains, several seats were reserved for smokers. On this particular day, the smoking seats were almost entirely occupied and,

according to Mr. Atkinson, those occupants were almost without exception engaged in the act of smoking cigarets, at least when the train departed Brockville. One can well believe Mr. Atkinson's description of the situation as "becoming very smoky."

Mr. Atkinson has a mild asthmatic condition. He controls it, under normal circumstances, by using an inhaler, when he feels this to be necessary. Between Brockville and Kingston, the smoke in those two cars made it difficult for him to breathe. He began to fear that if he continued to do conductor's work in those cars, particularly in the vicinity of the puffing passengers, he would have an attack of asthmatic illness and he would be in "danger" within the meaning of the Code.

Danger is defined as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

Mr. Atkinson told the Board that he contemplated immediately invoking his right to refuse to work under the Code, but he did not implement this contemplation because it might have meant stopping the train somewhere between Brockville and Kingston. He waited until the latter city because he knew a senior VIA Rail manager would be boarding the train there.

At Kingston, he met this official, B.L. Abbott, Trainmaster/Master Mechanic, and reported that he was refusing to work in the two coaches because of danger to himself from cigaret smoke. Mr. Abbott apparently accepted Mr. Atkinson's refusal; he explained Mr. Atkinson's problem

to the assistant conductor and asked him to substitute in for the conducting job in those two cars. The assistant conductor did so and the train proceeded onwards to Toronto.

A safety officer, W.B. Armstrong, was notified. He proceeded to Union Station in Toronto to be present when the train arrived at approximately 3:42 p.m. and to investigate Mr. Atkinson's refusal. The Board was told by Mr. Armstrong that a meeting was first convened at the Trainmaster's office at Union Station with Mr. Atkinson, Mr. Abbott, a member of the safety and health committee, and others in attendance. Mr. Atkinson's problem was identified in Mr. Armstrong's report as: "Concern for his health due to alleged excessive amounts of second hand smoke."

During the discussion of the matter, it was confirmed that almost all smoking seats on the train had been occupied.

Safety officer Armstrong then inspected the coaches where the smoking had taken place. By this time, the train had been in the station for some time, passengers had long since departed, doors had remained open and smoke had disappeared. An inspection of the ventilation system was carried out but it was found to be in order. Mr. Armstrong concluded that although a residual odour of cigaret smoke could be detected there was no visible evidence of smoke in the atmosphere. He took the position that his task under section 129 of the Code, following a refusal, was to determine at the time of his investigation whether a dangerous condition existed. He concluded there was no evidence that a dangerous condition existed at that point and therefore, to use his words, "the refusal was

terminated forthwith."

In his letter to Mr. Atkinson and VIA Rail setting out his conclusions, dated April 3, 1992, Mr. Armstrong was at pains to outline what is a safety officer's role respecting a section 128 refusal. For example, he said:

"On a Work Refusal, the alleged dangerous condition must be actual and present not only at the time of the 'Refusal' but also during the Safety Officer's investigation.

The dangerous condition must be real and not a remote possibility.

During my investigation there was no actual evidence to indicate a dangerous condition existed to corroborate the Refusal."

He described the situation as "the dangerous condition perceived by Conductor Atkinson." To the use of the word "perceived," Mr. Atkinson took considerable umbrage at the hearing. He maintained that the dangerous condition was unambiguously real at the time he refused to work, not simply perceived, but he conceded that the smoke had certainly cleared and the actual danger to himself had passed by the time Mr. Armstrong carried out his on-site investigation.

The Board has no reason to doubt that Mr. Atkinson was actually in danger within the meaning of the Code on March 29, 1992 between Brockville and Kingston when the situation was as he described it. Instead of stopping the train and stranding the passengers in the midst of the beauties of rural Leeds or Frontenac counties, he did the wise thing and simply removed himself from the source of the problem. When he arrived in Kingston, he ensured that he would not be exposed to danger by again doing the wise thing and announcing his refusal to work. Then VIA Rail in the

person of Trainmaster Abbott did the wise thing by accepting the refusal and arranging for the matter to be investigated when the train reached Toronto.

It seems, however, that in the light of recent Federal Court of Appeal decisions respecting the appropriate interpretation of the right-to-refuse provisions of the Code, what this Board may think about the validity or otherwise of Mr. Atkinson's refusal when he actually exercised that right to refuse is largely beside the point. Instead, the question which the Board has to answer is whether the safety officer was correct in finding at the time of his investigation that danger did not exist, regardless of what might have been the situation at the time of Mr. Atkinson's refusal.

In two decisions (Bidulka v. Canada (Treasury Board), [1987] 3 F.C. 630; and (1987), 76 N.R. 374, and Canada (Attorney General) v. Bonfa (1989), 73 D.L.R. (4th) 364; and 113 N.R. 224) the Federal Court of Appeal said that when a safety officer investigates a claim of danger under section 129 of the Code, after there has been a refusal to work and the various steps set out in section 128 have been followed, he or she is confined, in effect, to basing his or her decision as to whether danger exists on the situation that prevails at that point - not at the earlier point when the employee believed there was danger and accordingly refused to work. In these decisions, the Court also said in effect that the Board's task is to determine whether the safety officer decided correctly, not whether the employee was right in believing originally that danger existed.

In the past, the Board (certainly including the instant

panel) has not always fully appreciated and/or applied this distinction. In judging a safety officer's decision that danger does not exist - which is its basic involvement in sections 128 and 129 of the Code - it has often focused rather more sharply than now appears appropriate on the difficult task of reconstructing the situation which impelled the employee to believe in the first instance that danger existed. Instead, it should have directed its primary attention to reconstructing what the safety officer encountered during the course of his or her investigation. While the situation might still be similar to that which originally prevailed when the employee called attention to it and refused to work because of the perceived danger, it might have completely changed, as happened here, or even been corrected in the view of the employer, and danger might no longer exist. In either case, the limited purpose for which the legislator established sections 128 and 129 - namely to allow persons to withdraw themselves from danger as defined in the Code - would have been met. This limited purpose will be alluded to again later.

III

The pertinent parts of sections 128, 129 and 130 (for the purposes of this case) read as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place.

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or

(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision.

(3) Prior to the investigation and decision of a safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternate work, and shall not assign any other employee to use or operate the machine or thing or to work in that place unless that other employee has been advised of the refusal of the employee concerned.

(4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing or to work in that place until the direction is complied with or until it is varied or rescinded under this Part.

(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.

130.(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may

(a) confirm the decision; or

(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."

It is common knowledge than when the right-to-refuse provisions were written into the Code in their original form in 1978, and when they were subsequently amended but not really changed in principle, there was much concern in the business community that they would be misapplied by employees and unions in order to promote other, and not necessarily safety, agendas. Thus, their relative, detailed complexity, compared to other sections of the Code, and the numerous "safeguards" built into them.

The refusal process, and the determination of what is to be done vis-à-vis a refusal, may be viewed as an ongoing series of steps, with various rights and obligations arising along the way. The process begins when an employee, while at work has reasonable cause to believe that the use or operation of a machine or thing constitutes a danger or that a condition exists in the place which threatens danger. The employee may refuse to work in the face of that perceived danger. Section 128(6) requires the employee to report the situation and the refusal to the employer and to a member of the safety and health committee or to the safety and health representative "forthwith." (Whether there is a safety and health committee or a safety and health representative depends on other regulations and has to do mainly with the size of the work-force.)

The Board has taken the position in other cases that an employee's failure to notify a safety and health committee member or a representative does not nullify the process at this stage, nor does it deny an employee access to section 133. Obviously, there is an absolute necessity to notify the employer, in order, among other things, that something could be done immediately about the alleged danger, if

found then by the employer to exist. Presumably there are refusals to work that are reported to employers, where dangers are eliminated immediately, and that is as far as the process goes or needs to go. These situations are, of course, unknown to the outside world and not capable of being counted.

For certainty, however, the Code gives formal expression in section 128(7) to the employer's obligation to pay attention to an employee's report concerning perceived danger and to respect his or her refusal to work. An employer must investigate the employee's report in the presence of the employee and a non-management member of the safety and health committee or a safety and health representative or a person selected by the employee, depending upon the circumstances of the case. Again, the absence of a third party to witness the investigation does not render this step in the process to be a nullity. On the other hand, neither the employer nor the employee could insist that a third party be barred from involvement if the other insisted on such a presence.

Section 128(8) contemplates that the employer, after the investigation, will either take steps to change the machine, thing or place so as to try to remove the danger, or may insist that no danger exists, either because the employer thinks it was not there in the first place or because it has since disappeared - like unpleasant cigaret smoke. The employee, however, may continue to believe that the action taken by the employer has not eliminated the danger or may be in disagreement with the employer's conclusion that danger does not exist. He or she continues to enjoy the protection of the Code against the possibility that there may in fact still be danger; he or she may

continue to act upon his or her "reasonable cause to believe" that danger persists and may continue to refuse to do the work.

In this situation of stand-off, the impartial third party who decides whether the situation is still dangerous is the safety officer. Section 129(1) provides that both the employer and the employee have the responsibility to ensure that a safety officer is involved to resolve the impasse. By putting the responsibility on both parties, the legislator avoided the difficult problem of deciding which one, the employer or the refusing employee, had the primary interest in ensuring a resolution of the dispute. To the legislator, one thing was certain: one or the other of the disputants would certainly have an interest in bringing the matter to a resolution and thus one or the other, if not both, would undoubtedly summon the safety officer without delay.

Occasionally, this dual responsibility provision has given rise to problems of another kind. It has happened that an employee has failed to notify a safety officer. The notification has come only from the employer. The safety officer makes a finding that danger does not exist. The employer makes the mistake of penalizing the employee for having exercised the right to refuse. The employee then complains to the Board that he or she has been penalized contrary to section 147(a). The complaint is made under section 133, the relevant portion of which reads as follows:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to

subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."

The employer argues that the Board cannot deal with the complaint because the employee has not complied with section 129(1) in that he or she did not notify the safety officer. The Board, however, has taken the position that the employee's failure to make the notification is a matter of form only and is not fatal to the complaint. This view is supported by the fact that section 129(1) requires the safety officer "forthwith" on the receipt of notification from either the employer or the employee - not both - to investigate the matter.

The wording of section 129(2) suggests, and common sense confirms, that the realistic focus of the safety officer's investigation mandate is on that which exists at the time of the investigation and on whether there is danger at that time. If the safety officer decides under section 129(5) that there is no danger within the meaning of the Code, the employee may require the decision to be referred to the Board. It is that decision, its "circumstances" and "the reasons therefor," that the Board is called upon to review and confirm or not under section 130(1), not specifically the original perception of danger by the employee who triggered the whole thing, although the latter is obviously the key circumstance in the whole matter leading up to the

investigation.

IV

In the instant case, the facts are clear. At the time safety officer Armstrong investigated under sections 129(1) and (2) and made his decision, the factor or factors which Mr. Atkinson considered to be dangerous to himself were no longer present. Mr. Armstrong was quite correct in deciding that a condition did not exist at that time that was dangerous to Mr. Atkinson. The Board has no problem in confirming that decision.

It seems probable to this panel of the Board that, notwithstanding the existence of the right-to-refuse sections in the Canada Labour Code for some 14 years, the actual meaning and appropriate use of the provision encounters frequent misunderstanding. It was never intended as anything more than a case-by-case means of ensuring that an employee could withdraw without reprisal, on what amounted to an emergency basis, from a situation he or she believed to be dangerous to him or her. While the employee has to have "reasonable cause to believe" that danger exists, there is nothing in the statute which says that he or she must have absolute, objective certainty that the danger is provable before invoking the right to refuse.

Simply because the safety officer's mandate and the Board's review mandate only go as far as the actual situation prevailing at the time of the investigation, and because Mr. Armstrong found that the smoke had cleared and danger no longer existed, does not mean Mr. Atkinson was wrong when he decided the situation was dangerous to himself and refused to work. He or anybody else who in good faith has "reasonable cause to believe" that danger exists, has every right - indeed, has an obligation to himself or herself -

to withdraw from that apprehended danger, regardless of what may be the outcome of subsequent inquiries. This is common sense. To have it ultimately determined by a safety officer that danger does not exist does not mean that danger did not exist; such a determination should not be taken as a slap in the face. Indeed, it would not be out of line for persons to be more trusting of safety officers' expertise. Moreover, any person who invokes the right to refuse in good faith, whether he or she turns out to be correct or incorrect, is protected by sections 147(a) and 133 against reprisals by an employer, for so doing.

There is also a misapprehension that the right-to-refuse process can or should be called into play as a means to encourage or force the establishment of a new safety policy or regulation via a safety officer's direction, or the Board's direction, if the Board decides that a safety officer was wrong. In the instant case, for example, some might harbour the objective that the Board should overturn the safety officer's finding and issue a direction to VIA Rail that its trains must henceforth be totally smoke free - or whatever - so that employees like Mr. Atkinson would be assured complete and constant protection against a possible recurrence of the March 29 situation. That, however, is acting beyond the realm of adjudication. It is not the kind of use to which the legislator intended the safety officer's or the Board's involvement in the right-to-refuse provision to be put. The intention, as was suggested earlier, was that the provision itself would be employed much more narrowly, as it has been employed here by Mr. Atkinson. If new policies or regulations are required, it would be up to the legislator or even VIA Rail to develop and impose them. Meanwhile, and pending such new policies or regulations, it goes without saying that

Mr. Atkinson and any other employees of VIA Rail who are similarly situated continue to have the option of exercising in good faith the right to refuse under section 128 of the Code where they encounter circumstances similar to those of March 29 which they may have reasonable cause to believe constitute dangers to themselves.

A handwritten signature in cursive script, appearing to read 'T. Eberlee', is written over a horizontal line.

Thomas M. Eberlee
Vice-Chairman

DATED at Ottawa, this 24th day of September 1992.

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Summary

CANADIAN COUNCIL OF BROADCAST
UNIONS ET AL., APPLICANTS, CANADIAN
BROADCASTING CORPORATION ET AL.,
RESPONDENTS, AND CLAUDE
LATRÉMOUILLE, INTERVENER.

Board File: 530-2104

Decision No.: 959

Résumé

CANADIAN COUNCIL OF BROADCAST
UNIONS ET AUTRES, REQUÉRANTS,
SOCIÉTÉ RADIO-CANADA ET AUTRES,
INTIMÉS, AINSI QUE CLAUDE
LATRÉMOUILLE, INTERVENANT.

Dossier du Conseil: 530-2104

Décision n°: 959

The Board dismisses an application
for reconsideration of a decision
rendered in Canadian Broadcasting
Corporation (1992), as yet
unreported decision no. 954
(originally issued as letter
decision 1039), where the Board had
dismissed various applications for
certification pursuant to section
32 of the Code.

The application for reconsideration
put in issue the nature and breadth
of the discretion contained in
section 32 of the Code.

The Board examines the nature and
breadth of said discretion and
states that it empowers the Board
to consider factors with respect to
the certification of a council of
trade unions which it could not
take in consideration with respect
to the certification of a union
pursuant to section 28 of the Code.

The Board dismisses the application
for reconsideration because the
original panel properly applied
Board policies and correctly
interpreted section 32.

Le Conseil a rejeté une demande en
vue de réexaminer la décision
rendue dans Société Radio-Canada
(1992), décision du CCRT n° 954,
non encore rapportée (publiée au
départ sous forme de décision-
lettre n° 1039), où le Conseil
avait rejeté diverses demandes
d'accréditation présentées en vertu
de l'article 32 du Code.

La demande de réexamen portait sur
la nature et l'étendue du pouvoir
discrétionnaire prévu à l'article
32 du Code.

Le Conseil a passé en revue la
nature et l'étendue de ce pouvoir
discrétionnaire. Selon le Conseil,
ce pouvoir l'autorise à étudier des
facteurs dans le contexte de
l'accréditation d'un conseil de
syndicats dont il n'aurait pas pu
tenir compte dans le contexte de
l'accréditation d'un syndicat aux
termes de l'article 28 du Code.

Le Conseil a rejeté la demande de
réexamen parce que le banc initial
avait bien appliqué les politiques
du Conseil et bien interprété
l'article 32.



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Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Council of Broadcast Unions,

Canadian Wire Service Guild, Local 213 of the Newspaper Guild,

National Association of Broadcast Employees and Technicians,

Association of Television Producers and Directors,

Canadian Television Producers and Directors Association,

applicants,

and

Canadian Broadcasting Corporation,

Canadian Union of Public Employees - Broadcast Council of CUPE,

Alliance of Canadian Cinema, Television and Radio Artists,

National Radio Producers Association,

Service Employees International Union, Local 204,

La Société des auteurs, recherchistes, documentalistes et compositeurs,

United Steelworkers of America,

respondents,

and

Claude Latrémouille,

intervener.

Board File: 530-2104

The Board was composed of Ms. Louise Doyon and Messrs. J. Philippe Morneau and Richard I. Hornung, Q.C., Vice-Chairs.

Appearances (on record):

Mr. Aubrey E. Golden, Q.C., for the applicant;

Mr. David W.T. Matheson, for the National Radio Producers' Association;

Mr. Howard Goldblatt, for the Association of Television Producers and Directors and the Canadian Television Producers and Directors Association;

Mr. Gaston Nadeau, for the Canadian Union of Public Employees;

Ms. Suzanne Thibaudeau, Q.C., for the Canadian Broadcasting Corporation;

Mr. Paul Falzone, for the Alliance of Canadian Cinema, Television and Radio Artists;

Mr. Claude Latrémouille, on his own behalf.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chair.

On July 22, 1992, the Board received an application made pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) to reconsider the Board's letter decision no. 1039, rendered on June 29, 1992, (now issued as Canadian Broadcasting Corporation (1992), as yet unreported CLRB decision no. 954) and hereinafter referred to as decision no. 954.

Decision no. 954 (formerly LD 1039) disposed of various applications for certification pursuant to section 32 of the Code (Part I - Industrial Relations) filed by the Canadian Council of Broadcast Unions, (Board file Nos. 555-3324, 555-3326, 555-3327, 555-3328 and 555-3329). The applications for certification were all dismissed by the Board following the exercise of its discretion pursuant to section 32 of the Code.

The grounds upon which the applicants seek reconsideration are:

"(1) That the hearing panel dismissed the certification application of the CCBU on the grounds that its structure, the bargaining history of its constituent unions and its constitution rendered it inappropriate as a bargaining agent, contrary to the established policy and practice of the Canada Labour Relations Board against such enquiries into the respective merits of bargaining agents, and

(2) That the hearing panel erred in law and exceeded its jurisdiction in deciding that the CCBU was inappropriate as a bargaining agent and not available for selection by the employees in their newly-established bargaining units. The Board has no power in law to decide upon the appropriateness of a bargaining agent, whether or not it is a council of trade unions. The Board has asked itself the wrong question and erred in its interpretation of the scope of its jurisdiction under the Canada Labour Code, and

(3) The hearing panel has wrongly assumed that the CCBU would create or perpetuate jurisdictional divisions between its constituent unions rather than represent all employees in each bargaining unit in good faith. Now employees will occupy a single classification within the new unit according to their core function and will be covered by only one collective agreement. The obsolete practice of classifying employees into multiple units covered by different collective agreements held by different bargaining agents and is now impossible, and

(4) Two or more trade unions are entitled to form a council to be the exclusive bargaining agent for all persons within the bargaining unit. They are not required by law to accept all unions wishing to join the council, nor to combine or agree with all other interested unions on the form or structure of their organization, nor must their dues or other constitutional provisions be identical. Nor must they be free of previous history as representatives of any or all employees in the new bargaining unit for which they seek certification. The board has misinterpreted its jurisdiction to grant a council the right to be certified by imposing these burdens upon the CCBU and has thereby exceeded the powers granted to it by the Canada Labour Code, and

(5) The employees in the bargaining unit are entitled to decide whether their selected bargaining agent is appropriate to represent them in their relations with their employer. By their decision, the hearing panel has denied employees this right and therefor their freedom of association as granted by Section 2(d) of the Canadian Charter of Rights and Freedoms and as mandated in the interpretation of the Canada Labour Code." (sic)

The respondents and the intervener who filed replies to this application generally submitted that the Board panel that rendered decision no. 954 (formerly LD 1039) had not made any error in its interpretation of the Code or of a Board policy and that no new facts were alleged by the applicants.

This application was referred to this Board panel, meeting in camera as a reconsideration panel, in accordance with the Board's review policies as described in British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); Wardair Canada (1975) Ltd. (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434); Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580); Canadian Broadcasting Corporation, (1987) 70 di 132; and 17 CLRBR (NS) 43 (CLRB no. 636); Curragh Resources and Altus Construction Services Ltd., (1987) 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640); and CanWest Pacific Television Inc. (CKVU), (1991), as yet unreported CLRB decision no. 847.

In Curragh Resources and Altus Construction Services Ltd., *supra*, the role of such a reconsideration panel was described as follows:

"Upon receipt of a review application respecting a recent decision, a summit panel [now reconsideration panel] of the Board will determine if and where the application will be referred for review. When an application alleges that the original panel erred in its interpretation of the Code or of a Board policy, the summit may conclude that there is no merit in the claim and may then simply dismiss the matter. Or it may believe that the issues raised are sufficiently substantial to warrant the application being referred to a plenary session for consideration by all members of the Board. A referral does not mean that the summit panel accepts the claims of the applicant; simply that it believes there is cause for review.

The practice with respect to a review application that addresses an issue of fact is to refer it back to the original panel for consideration and disposition."

(pages 188; 235; and 14,267)

The grounds cited by the applicants allege errors of law and deviation from established Board policies as contained in the following decisions of the Board and others: Canadian Broadcasting Corporation, (1978), 27 di 765; and [1979] 2 CLRBR 41 (CLRB no. 138); Central Broadcasting Company Ltd. v. Canada Labour Relations Board et al., [1977] 2 S.C.R. 112; and (1976), 67 D.L.R. (3d) 538; Canadian Ass'n of Trades and Technicians v. Canada (Treasury Board), no. A-191-91, February 18, 1992 (F.C.A.); Reimer Express Lines Ltd. et al., (1979), 38 di 213; and [1981] 1 CLRBR 336 (CLRB no. 226). The real question at issue for reconsideration, however, is the nature and breadth of the discretion granted to the Board with respect to certification of a council of trade unions as the bargaining agent for a bargaining unit by section 32(2) of the Code which reads as follows:

"32(2) The Board may certify a council of trade unions as the bargaining agent for a bargaining unit where the Board is satisfied that the requirements for certification prescribed by or pursuant to this Part have been met."

(emphasis added)

It is common ground between all the parties herein that, contrary to certification of a trade union which is mandatory (where the requirements of the Code are met) on the Board by virtue of section 28 of the Code, the Board does have a discretion pursuant to section 32 whether or not to certify a council of trade unions. The applicants argue that the Board's discretion pursuant to section 32 is limited to the same criteria established by section 28 for certification of trade unions and rely on Canadian Pacific Express and Transport (1988), 73 di 183 (CLRB no. 682), Smith & Rhuland Limited v. The Queen, [1953] 2 S.C.R. 95, and Canadian Ass'n of Trades and Technicians v. Canada (Treasury Board), supra to support their position. They also rely on a number of Board decisions with respect to the certification of trade unions. The respondents, on the other hand, submit that the only limit on the discretion is that it be exercised judicially.

The decision of the Federal Court of Appeal in Canadian Ass'n of Trades and Technicians v. Canada (Treasury Board), supra, reversed the decision of the Public Service Staff Relations Board that had found, based on examination of the association's constitution, that the association was not an "employee organization" as defined in section 2 of the Public Service Staff Relations Act, R.S.C. 1985, c. P-35, as amended, which reads as follows:

"'employee organization' means any organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of this Act, and includes, unless the context otherwise requires, a council of employee organizations;"

The court set aside the decision of the Board because it had improperly expanded on the contents of the established criteria for an "employee organization" thereby exceeding its jurisdiction. It must be noted, though, that since the Court was dealing with an employee organization and not with a council of employee organizations, the Court did not deal with section 29 of the Public Service Staff Relations Act, supra which is very similar to section 32 of the Code and which gives a discretion to the Public Service Staff Relations Board similar to the Canada Labour Relations Board discretion pursuant to section 32 of the Code. In our opinion, this decision of the Federal Court of Appeal is not authoritative with respect to the present case because the Court was not therein dealing with section 29 of the Public Service Staff Relations Act, supra, the equivalent to section 32 of the Code which is in issue herein.

In Canadian Pacific Express and Transport, supra, the Board held:

"... For the purposes of this application, where the status of the Council is not in dispute, we are prepared to accept that a council of trade unions must at least meet the same minimum requirements that a trade union has to meet, i.e. file documents showing that it has been formalized to the extent that it is regulated by some form of constitution. the very wording of section 130(1) requires that a council of trade unions be made up of two or more trade unions. The Board must surely then satisfy itself that all of the trade unions that are part of a council of trade unions which is making application under section 130(1) are, in their own rights, trade

unions within the meaning of the Code. It makes sense that organizations which could not obtain trade union status on their own should not be permitted to obtain bargaining rights indirectly by becoming a part of a council of trade unions. The Board must also satisfy itself that each and every trade union that is a member of a council of trade unions has authorized the council to act on its behalf as a bargaining agent under Part V of the Code."

(page 186); (emphasis added)

This decision is predicated upon the fact that the status of the council in question was not put in issue, and it is also clear, that the requirements for certification as a trade union had to be met as a minimum. This does not take away the Board's discretion to look at factors additional to those required for certification of a trade union.

There have only been a few cases where the Board had to look at section 32 of the Code and it was in only a single case prior to this one that it collaterally examined the question of its discretion. That was in Canadian National Railway Company et al. (1986), 64 di 70 (CLRB no. 556), where in heading VI at pages 83 et seq. the Board expressed some factors which would be looked at with respect to a council of trade unions. These were all functional factors impinging on the ability of the Council to act as a bargaining agent according to the Code.

In its decision Canadian Broadcasting Corporation (1992), 92 CLLC 16,036 (CLRB no. 926), (the preceding decision to decision no. 954 (formerly LD 1039) between the same parties as herein), the Board dealt with its discretion under section 32 of the Code and, after a full review of the existing authorities, expounded the kinds of factors

which would be looked at by the Board to determine whether or not it would certify a council of trade unions. All of the factors therein mentioned by the Board were related to the viability of the Council as a bargaining agent and to the maintenance of the integrity and operation of the bargaining unit found appropriate by the Board.

The discretion granted to the Board in section 32(2) of the Code empowers it to take in consideration certain factors with respect to the certification of a council of trade unions which it could not take in consideration with respect to the certification of a union pursuant to section 28 of the Code. Such a construction of this discretion is rendered necessary by an overview of other provisions of the Code as discussed in Canadian Broadcasting Corporation, (926) supra, as well as by the simple fact that the said discretion would not otherwise be necessary. The only limits on this discretion are that it be exercised judicially and that the elements examined by the Board have proper labour relations connotations within the purview of the Code.

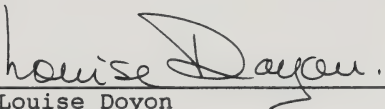
The examination of impugned decision no. 954 (formerly LD 1039) made by this panel reveals that the existing policies of the Board with respect to the certification of a council of trade unions by virtue of section 32 of the Code have been applied by the original panel. In consequence, there is no reason to refer the reconsideration to a plenary session of the Board in that respect.

The further grounds cited by the applicants allege that the original panel ignored or incorrectly interpreted the evidence adduced and representations made by the parties or did not reach the proper conclusions therefrom. These are factual questions.

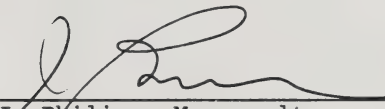
In the case under review, the facts were placed before the original panel for consideration and that panel drew the conclusions it deemed appropriate in the circumstances. This was within the jurisdiction of that panel. An application to reconsider such a decision must allege new facts or considerations which were not before the original panel, along with a stipulation of the reasons why such facts or considerations were not put before it. Further, such new facts or considerations must be of such a nature that a different decision would likely have been rendered had the original panel known of them. (See Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); and also Pacific Western Airlines Ltd. (1983), 52 di 178; and 5 CLRBR (NS) 260 (CLRB no. 444).) Such does not appear to this panel to be the case as all the facts were before the original panel.

The application for reconsideration certainly demonstrates that the applicants disagree and are dissatisfied with decision no. 954 (formerly LD 1039). The Board has always held, however, that such disagreement and dissatisfaction alone cannot support an application for reconsideration.

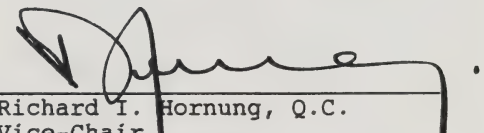
Based on all the above reasons this application for reconsideration is dismissed.



Louise Doyon
Vice-Chair



J. Philippe Morneault
Vice-Chair



Richard I. Hornung, Q.C.
Vice-Chair

ISSUED at Ottawa, this 25th day of September 1992.

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Résumé

Syndicat canadien de la Fonction publique, section locale 4030, requérant, Nationair (Nolisair International Inc.), Service de Personnel Sol-Air Corp. et M.Y. Air Sol Services Inc., intimées, et Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999 (Teamsters), mise en cause.

Dossiers du Conseil:

530-1892
560-254
585-395
745-3786
745-3834

Summary

Canadian Union of Public Employees, Local 4030, applicant, Nationair (Nolisair International Inc.), Service de Personnel Sol-Air Corp. and M.Y. Air Sol Services Inc., respondents, and Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 (Teamsters), mis-en-cause.

Board Files:

530-1892
560-254
585-395
745-3786
745-3834



Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999 (Teamsters), requérante, et Servisair Mirabel Ltée, intimée, et M.Y. Air Sol Services Inc., mise en cause.

Dossier du Conseil: 585-453

Décision n°: 960

Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 (Teamsters), applicant, Servisair Mirabel Ltée, respondent, and M.Y. Air Sol Services Inc., mis-en-cause.

Board File: 585-453

Decision no.: 960

Le Conseil a reçu du Syndicat canadien de la Fonction publique, section locale 4030 (le syndicat), plusieurs demandes visant à obtenir des redressements à la suite de la mise à pied des employés de Service de

The Board received from the Canadian Union of Public Employees, Local 4030 (the union), several applications seeking remedies following the lay-off of employees of Service de Personnel Sol-Air Corp. (Sol-Air), when that

Personnel Sol-Air Corp. (Sol-Air), au moment où cette compagnie a perdu le contrat de prestation des services d'agents passagers pour la compagnie Nationair à Mirabel, en novembre 1990. Ce contrat a alors été accordé à la compagnie M.Y. Air Sol Services Inc. (M.Y.). Le syndicat vise aussi à obtenir des redressements en s'appuyant sur le fait que Sol-Air aurait négocié de mauvaise foi lorsqu'elle a refusé de signer la convention collective en octobre 1990.

Le Conseil a jugé que l'employeur des agents passagers fournis par Sol-Air à Nationair était Sol-Air et non Nationair, comme le prétendait le syndicat. Le Conseil a refusé de décider au fond la demande de déclaration d'employeur unique et d'entreprise unique visant Nationair et Sol-Air ainsi que Nationair et M.Y. puisque, même si la réponse à cette demande était affirmative, le Conseil n'aurait pas exercé le pouvoir discrétionnaire que lui accorde l'article 35, et ce, compte tenu des circonstances de la présente affaire.

Le Conseil a rejeté la demande de déclaration de vente d'entreprise visant Nationair et M.Y. Il a cependant fait droit à celle visant M.Y. et Servisair Mirabel Ltée (Servisair), compagnie qui a succédé à M.Y. en septembre 1991.

company lost its contract to provide passenger services to Nationair at Mirabel, in November 1990. That contract was then given to M.Y. Air Sol Services Inc. (M.Y.). The union also seeks to obtain remedies based on the fact that Sol-Air had bargained in bad faith when it refused to sign the collective agreement in October 1990.

The Board found that the employer of the passenger agents provided by Sol-Air to Nationair was Sol-Air and not Nationair, as the union claimed. The Board refused to deal with the merits of the application for a single employer declaration and a sale of business declaration affecting Nationair and Sol-Air, and Nationair and M.Y., since even if the reply to this application had been affirmative, the Board would not have exercised the discretion conferred by section 35, taking into consideration the circumstances of the instant case.

The Board dismissed the application for a sale of business declaration involving Nationair and M.Y. It did however grant the application involving M.Y. and Servisair Mirabel Ltée (Servisair), the company that had succeeded M.Y. in September 1991.

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Compte tenu de ces décisions, le Conseil a rejeté les plaintes de pratiques déloyales dans lesquelles on demandait notamment que Nationair et(ou) M.Y. réembauchent les employés mis à pied à la suite de la perte du contrat par Sol-Air, et que l'ordonnance d'accréditation accordée à l'Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999 (Teamsters), en septembre 1990, pour représenter les employés de M.Y., soit déclarée avoir été obtenue illégalement.

Le Conseil a fait droit à la plainte de Line Picard, fondée sur le sous-alinéa 94(3)a)(i) du Code, puisque M.Y. a refusé de l'embaucher en novembre 1990 parce qu'elle occupait alors la fonction de présidente du syndicat. Le Conseil a déclaré que Servisair, employeur successeur, est liée par cette décision en application de l'alinéa 44(2)d) du Code.

Le Conseil a fait droit à la plainte de négociation de mauvaise foi dans laquelle le syndicat allègue que Sol-Air a violé l'article 50a) du Code lorsqu'elle a, en octobre 1990, refusé de signer la convention collective se fondant sur la perte du contrat de prestation des services d'agents passagers et lorsqu'elle a exigé l'ajout de conditions non préalablement négociées comme condition pour signer la convention collective.

In view of these decisions, the Board dismissed the unfair labour practice complaints that requested, among other things, that Nationair and/or M.Y. rehire the employees who had been laid off after Sol-Air lost the contract and that the certification order issued to the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999 (Teamsters), in September 1990, to represent M.Y. employees, be declared to have been obtained illegally.

The Board allowed Line Picard's complaint, pursuant to section 94(3)(a)(i) of the Code, since M.Y. refused to hire her in November 1990 because she held the position of union president. The Board declares that Servisair, successor employer, is bound by that decision in application of section 44(2)(d) of the Code.

The Board allowed the bad faith bargaining complaint in which the union alleged that Sol-Air had violated section 50(a) of the Code when it refused, in October 1990, to sign the collective agreement because it had lost the passenger services contract and when it required the addition of terms not previously negotiated as a condition to signing the collective agreement.

Reasons for decision

Canadian Union of Public
Employees, Local 4030,

applicant,

and

Nolisair International Inc.
(Nationair Canada), Service
de Personnel Sol-Air Corp.
and M.Y. Air Sol Services
Inc.,

respondents,

and

Teamsters, Brewery, Soft
Drink and Miscellaneous
Workers' Union, Local 1999,

mis-en-cause.

Board Files: 530-1892
560-254
585-395
745-3786
745-3834

Teamsters, Brewery, Soft
Drink and Miscellaneous
Workers' Union, Local 1999,

applicant,

and

Servisair Mirabel Ltée,

respondent,

and

M.Y. Air Sol Services Inc.,

mis-en-cause.

Board File: 585-453

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

Appearances

Ms. Beverley Burns, accompanied by Ms. Line Picard,
president, Local 4030, for the Canadian Union of Public
Employees;

Mr. Guy Tremblay, accompanied by Mr. Jim McLarnon, director,
industrial relations, for Nationair;

Mr. H. Laddie Schnaiberg, accompanied by Ms. Debrah Frost, assistant, and Mr. Marc Solignac, president, for Sol-Air; Mr. Christian Drolet, accompanied by Ms. Claudia Prémont and Mr. Guy Genois, comptroller, for M.Y.; and Mr. Daniel Carrier, accompanied by Mr. Gilles Laliberté, vice-president of Teamsters Local 1999.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Proceedings

On November 6, 1990, the Board received from the Canadian Union of Public Employees, Local 4030 (CUPE or the union), two applications pursuant to sections 35, 44, 94, 95 and 96 of the Code.

The conclusions sought in the first application read as follows:

"(a) a declaration that Nationair is the employer of the members of the bargaining unit;

(b) an order compelling Nationair to reinstate or rehire all persons previously employed by Sol-Air forthwith, with no loss of seniority and with full compensation for all damages suffered by such employees;

(c) an order that Nationair comply with the terms and conditions of the Airline Division collective agreement;

(d) in the alternative, a declaration that Sol-Air, Nationair and/or Air Sol is a single employer and is bound by the Airline Division collective agreement;

(e) an order compelling Sol-Air, Nationair and Air Sol to reinstate or rehire all persons previously employed by Sol-Air forthwith, with no loss of seniority and with full compensation for all damages suffered by such employees;

(f) an order that Sol-Air, Nationair and Air Sol comply with the terms and conditions of the Airline Division collective agreement;

(g) a declaration stating the certificate granted to the Teamsters concerning the passenger agents working for Nationair at Mirabel International Airport is revoked and of no force or effect;

(h) a declaration that a sale of business pursuant to section 44 of the Code has occurred;

(i) a declaration that Nationair and Air Sol have violated sections 94(1)(a), 94(1)(b), 94(3)(a)(i), 94(3)(a)(iii), 94(3)(b), 94(3)(e) and 96 of the Code;

(j) an order that the Nationair and Air Sol cease and desist from violating the Code and, in particular, those sections noted above; and

(k) such further and other relief as may be appropriate in the circumstances."

The following conclusions are sought in the second application:

"(a) a declaration that Nationair and Air Sol have violated section 94(3)(g) of the Code;

(b) an order that Nationair and Air Sol cease and desist from violating the Code and, in particular, the section noted above;

(c) a declaration that the Teamsters have violated sections 95(a) and (b) of the Code;

(d) an order that the Teamsters cease and desist from violating the Code and, in particular, those sections noted above;

(e) a declaration that any collective agreement entered into between the Respondents will not apply to any person performing passenger agent services for Nationair at Mirabel International Airport; and

(f) such further and other relief as may be appropriate in the circumstances."

These are files 530-1892, 560-254, 585-395 and 745-3786.

On January 25, 1991, CUPE filed a complaint under section 50(a) of the Code, involving Service de Personnel Sol-Air Corp. (Sol-Air). The Minister authorized the complaint on January 16, 1991. The conclusions sought are the following:

"(a) a declaration that Sol-Air has bargained in bad faith and has violated section [sic] 50(a)(i) and 50(a)(ii);

(b) an order directing Sol-Air to sign the collective agreement negotiated with the Airline Division;

(c) an order that Sol-Air comply with the terms and conditions of the collective agreement, including payment of all retroactive monies owing, and

(d) such further and other relief as may be appropriate in the circumstances."

This is file 745-3834.

The Board combined all these files for the purposes of hearing evidence, given the similarity of the allegations made and the nature of the conclusions sought. The Board began by asking the employers to provide an overview of the operations of the businesses involved. It made clear, however, that this request to proceed first in no way affected the obligation of each party to assume the burden of proof incumbent on it, having regard to the nature of the various applications.

Public hearings were held in Montréal on March 4 to 6, May 13 to 17, June 17 to 20, December 9, 10, 13, 16 and 17, 1991 and on March 4 and 5 and April 9 and 10, 1992.

On November 12, 1991, the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union (the Teamsters) filed an application under sections 44 and 45 of the Code, involving M.Y. Air Sol Services Inc. (M.Y.) and Servisair Mirabel Ltée (Servisair).

This application sought the following conclusions:

"declare that there was a sale of part of a business between 'M.Y. Air Sol' and 'Servisair';

declare that the Teamsters, Brewery, Soft Drink and Miscellaneous Workers' Union, Local 1999, is the bargaining agent for the employees of Servisair Mirabel Ltée;

declare that the appropriate unit in this case is:

'All employees of Servisair Mirabel Ltée, excluding office employees, supervisors and those above';

issue a certification certificate accordingly;

make any further order that the Board deems appropriate."

(translation)

This is file 585-453. The Board added it to the other files in these proceedings.

II

The Facts

1. CUPE is certified to represent the following group:

"all passenger agents working at Nationair (Nolisair International Inc.), employed by Service de Personnel Sol-Air Corp."

The original application for certification, filed on June 8, 1987, designated Nolisair International Inc. (Nationair Canada) (Nationair) as the employer of this group of employees. When this application was filed, Nationair and Sol-Air objected to the designated employer; Sol-Air claimed that it was the employer. In January 1988, the union amended its application for certification to read as follows:

"In conclusion, the applicant is therefore asking the Canada Labour Relations Board, given the allegations contained in the replies and objections of Nationair and Service de Personnel Sol-Air Corp., and given the allegations contained in the present reply of the applicant, to:

(i) officially add Service de Personnel Sol-Air Corp. to these proceedings under section 118(o) of the Canada Labour Code and substitute it as the employer in the place of Nationair;

(ii) *certify the applicant to represent all passenger agents employed by Service de Personnel Sol-Air Corp. working at Nationair; ..."*

(translation)

The Board did so on June 1, 1989.

That application for certification, filed shortly after the Board issued, on May 19, 1987, its decision in Nationair (Nolisair International Inc.) (1987), 70 di 44; and 19 CLRBR (NS) 81 (CLRB no. 630), involved the same parties. That case raised the same question: who was the real employer of the flight attendants working for Nationair and supplied by Sol-Air? The Board decided then that the real employer of these persons was indeed Nationair and certified the union accordingly. According to Raymond Leclerc, union representative, the amended application of January 1988 was made on the strength of information then in its possession, i.e., that Sol-Air had changed its operating methods since the filing of the application for certification in June 1987, particularly with regard to hiring and training. Mr. Leclerc did not specify either the source or the exact nature of this information. According to him, in these circumstances, the debate over the identity of the employer could have been long and the outcome different from that obtained in the case involving the flight attendants.

2. Nationair began operations on December 19, 1984. Initially, it did not maintain its own aircraft, did not provide ramp services and did not check in or assist passengers. In 1985, it took over maintenance of its aircraft, which is now being done by its affiliate, Technair Aviation Inc. Nationair maintains its aircraft in Toronto and Québec. Hudson General Inc. has been providing ramp services from the beginning, whereas various companies have checked in and assisted passengers, services which are, for

the purposes of these reasons, referred to as "passenger agent services." Nationair has therefore never operated either of these two services.

3. On November 10, 1986, when Sol-Air entered into its first contract with Nationair to provide passenger agent services, it succeeded another contractor. At the time, Sol-Air was a party only to that passenger agent services contract, a situation which continued until November 1990.

Its president, Marc Solignac, is the son of Claude Solignac who held various positions with Nationair between 1985 and 1989, including senior maintenance manager and senior maintenance planning manager. Marc Solignac was president of Accent Litho Design Inc., 38% of whose shares were held by Nationair, which lost the funds it had invested in this company when the company declared bankruptcy at the beginning of 1990. Nationair had nothing to do with the management of this company. It was a customer of Accent Litho Design Inc. which did certain printing work for it. However, Nationair did not award all its printing work to this company.

The successive contracts between Sol-Air and Nationair were renewed annually between 1986 and 1989. The last contract expired on November 30, 1990. Although the purpose of these contracts was always the same, i.e., to provide passenger agent services, some provisions were amended over the years, in particular the terms and conditions of the supervision that Nationair exercised over hiring and training. These provisions and the various aspects of their application are at the heart of this dispute. These different elements explain CUPE's present applications, whose primary purpose is to have the designated employer changed. The union claimed that the rules governing the

performance of the passenger agents' duties were amended between January 1988, when the union agreed to Sol-Air's being designated employer, and November 1990, when Sol-Air lost its contract, and the changes were such that the ensuing situation made Nationair and/or the subcontractors the real employer.

The purpose of the contract between Sol-Air and Nationair was to provide passenger agent and supervisory services to ensure that the arrivals and departures of Nationair flights at Mirabel proceeded normally. To this end, the contract provided for the number of passenger agents and supervisors to be supplied by Sol-Air and the wage rates to be paid to Sol-Air for services rendered. This was Sol-Air's only source of income. A Nationair supervisor was present, with few exceptions, when a Nationair flight was scheduled for departure. Upon the arrival of a flight, a Nationair supervisor was present if there was a delay or if other exceptional circumstances required his/her presence. The role of Nationair supervisors was to control the quality of the service provided by Sol-Air to Nationair's customers. During the term of Sol-Air's contracts, four Nationair supervisors were assigned to these contracts. The presence in the work place of Nationair supervisors during the passenger agents' working hours was not a provision of the contract.

The duties of the passenger agents can be summarized as follows: to check in passengers and baggage; to monitor operations (administrative or office work); to answer customer telephone inquiries; to control passenger traffic at the counters; to sell PLUS class tickets (at the airport); to assist passengers at the boarding gates; and to escort passengers to the aircraft. In the case of incoming

flights, the agents greet the passengers and see to their needs, as required.

The agents are hired by Sol-Air. This company is responsible for pay, training, assignments, hours of work, discipline, lay-offs and recalls, as the case may be.

Hours of work are set according to the number and schedule of Nationair flights. Sol-Air supervisors assign duties to the agents before each flight departs. This is preceded by a briefing attended by the Sol-Air supervisor and the passenger agents. As a rule, a Nationair supervisor attends these meetings.

The passenger agents wear the same uniform as Nationair flight attendants wear, with the exception of a few details. They perform their duties at the designated Nationair counters and use Nationair's administrative offices and equipment (telephone, computer, travel documents, etc.). The passenger agents who testified identify with Nationair and believe that it is their real employer.

No provision in the contract allows Nationair, specifically through its supervisors, to intervene in the application of the terms of the contract. In fact, the evidence shows that Nationair supervisors play an active role, i.e., they communicate directly with the passenger agents and ask them to perform a particular task or duty at a given time. For example, a Nationair supervisor might ask an agent to go and get a wheel chair, take a bicycle down to the baggage room, provide pre-boarding assistance to a child or a disabled person or answer the telephone. Nationair supervisors have on occasion also asked Sol-Air supervisors to alter an agent's assignment, to tell an agent to improve his/her personal appearance or to work overtime.

The evidence concerning the frequency, nature and importance of the interventions by Nationair supervisors is contradictory. What essentially emerged from the lengthy testimony given by numerous witnesses in this regard is that, in practice, Nationair supervisors, who are responsible for controlling the quality of the services provided by Sol-Air, have sometimes exercised their duties more actively and with greater attention to detail than the close supervision of quality control would have required.

There are a number of reasons for this situation. The first appears to be the personality of the individuals concerned. Some Nationair supervisors were more interventionist than others, and some Sol-Air supervisors were more assertive than others. A second reason is the volume of activities. It is not unusual, during periods of heavy traffic, in both summer and winter, for Nationair to have four or five departures in an evening, which entails the processing of a large number of customers, i.e., some 2000 to 2500 passengers, in the space of a few hours. A third and final reason has to do with the organization of work. For example, when the checking in of passengers at the counter is nearing completion, but is not yet complete, the Sol-Air supervisor goes to the boarding gate to monitor the boarding procedure and to resolve promptly any problems that might arise. In this instance, the agents on duty at the check-in counter and in the office remain alone with the Nationair supervisor. If specific problems or questions do arise, it is the Nationair supervisor who handles them.

The duties of Nationair supervisors did not change fundamentally between 1988 and 1990, that is, the supervisors did not exercise, over the years, any more control over the work of the passenger agents than they had exercised previously. That is, generally speaking, what the

evidence revealed, and at least one passenger agent testified to that effect. That agent also felt that Sol-Air supervisors became more vigilant and demanding during that period.

Between 1989 and 1990, Nationair approached Sol-Air to remind it of certain terms and conditions of the contract or certain procedures implemented by Nationair. For example, on February 24, 1989, Nationair asked Sol-Air to inform it if Nationair supervisors were giving the passenger agents work instructions. Moreover, several communications with Sol-Air in 1989 and 1990 were designed to inform it of shortcomings or mistakes in work methods and to request that corrective action be taken. Subjects raised on these occasions included the check-in procedure (the absence of boarding cards or baggage tags), the documents required to enter certain countries, the time allowed and the procedures to be followed during boarding, public announcements and other such matters.

The documentary evidence did not establish that Nationair had asked Sol-Air to discipline passenger agents or that it intervened in the organization of work, other than to ask that its operating rules be applied.

4. In the fall of 1989, the union and Sol-Air entered into negotiations with a view to concluding a first collective agreement. These negotiations continued until September 1990, when an agreement in principle was reached. However, a collective agreement was never signed because of the subsequent events that gave rise to these proceedings. They can be summarized as follows.

The parties met some 20 times. From the outset, the union laid its cards on the table. It informed the employer that

it intended to secure for the passenger agents the same terms and conditions of employment enjoyed by Nationair employees, in particular in the areas of vacations, insurance benefits or free travel on Nationair flights. The union also demanded that the minimum wage in the industry, then \$7.00 an hour, be granted to these employees. It also wanted the following clause included in the collective agreement:

"24.02 The Company agrees to enter into negotiations with Nationair with a view to guaranteeing PSA employees covered by this collective agreement that they will be hired directly by Nationair, should Nationair stop requiring PSA to provide it with passenger agents.

In that event, Nationair agrees to fully recognize the collective agreement and length of service with PSA."

(translation)

Line Picard, union president, and Eric Moirat, union vice-president, both of whom sat on the bargaining committee, explained that the purpose of this collective bargaining was to obtain better working conditions for the passenger agents through negotiations with Sol-Air, even though they still believed that Nationair was their real employer. Clause 24.02 was designed to protect the future of Sol-Air employees in the event of a loss of contract. Sol-Air had always refused to include this clause in the collective agreement. The union withdrew this demand in June 1990, following which bargaining and conciliation sessions appear to have been more productive. Sol-Air rejected the other demands designed to achieve parity with Nationair employees in certain areas, either because it could not have financed them or because Nationair rejected them, as in the case of the number of free trips.

An agreement in principle was reached at the final bargaining session on September 13, 1990. The union was to

put the finishing touches to the text of this agreement and submit it to the employer. In the meantime, on September 14, Ms. Picard and Mr. Solignac sent a notice to all employees inviting them to celebrate the successful conclusion of bargaining:

"Friday, September 14, 1990

*To all Sol-Air employees
We are pleased to inform you that a three-year collective agreement has been ratified by the employer and the union. This agreement has also been accepted by the employees. To celebrate this event, you are invited to a wine and cheese party, to be held at the Château de l'Aéroport on September 25 at 7:00 p.m.*

Hope to see you there.

*Marc Solignac
President of Sol-Air*

*Line Picard
Union President (CUPE Local 4030)"*

(translation)

On October 4, a copy of the text of the collective agreement, signed by the union representatives on October 1, 1990, was sent to the employer. According to the employer, the text did not accurately reflect the agreement reached between the parties. However, the parties did not dwell on clarifying the text because Sol-Air informed the union that it would not sign the collective agreement because it had lost the passenger agent services contract and could not, it argued, grant the retroactive pay negotiated and the new rates of pay to take effect with the signing of the agreement. It then asked the union to agree to certain other provisions before it would sign the collective agreement: inclusion of Sol-Air supervisors in the bargaining unit; recognition as bargaining unit members of the replacement workers used during job actions; and abandonment of the statutory 16-week lay-off notice period. It also made its signing the agreement subject to the union's absorbing the cost of the above provisions. The

general assembly of the union did not accept these new employer demands, and the collective agreement was never signed.

When questioned as to why these negotiations took so long, Raymond Leclerc explained that he could find no particular reason for the delay, other than the usual time needed to consult the employees and work out demands that were in keeping with bargaining trends in the airline industry. Moreover, there was no mention, during negotiations, of applying for a review of the certification order to substitute Nationair as the employer in the place of Sol-Air.

It was in the wake of these developments that the union filed these applications.

5. On August 29, 1990, Nationair asked a number of companies, including Sol-Air and M.Y., to submit tenders for the passenger agent services contract for its Mirabel operations, i.e., the services then being provided by Sol-Air under the contract that was to expire on November 30, 1990. These two companies, among others, submitted tenders. To this end, they used the standard ground handling agreement recommended by the International Civil Aviation Organization and required by Nationair. Since beginning operations, Nationair had been using this standard contract for ramp activities and other related services that it had third parties provide, both at Mirabel and elsewhere. However, it had not used this standard contract for the contracts entered into with Sol-Air.

On October 4, 1990, Nationair informed Sol-Air that its contract would not be renewed and the same day awarded this contract to M.Y. At the same time, Nationair invoked the

30-day notice clause and informed Sol-Air that it was terminating the contract, before its expiry date, on November 4, 1990. The loss of this contract resulted in the permanent lay-off, effective that date, of the employees covered by the certification order of June 1, 1989. It also resulted, as we know, in Sol-Air's refusing to sign the agreement in principle already negotiated.

6. M.Y., which succeeded Sol-Air in providing passenger agent services at Mirabel, has held, since June 1, 1988, a similar contract covering Nationair's operations at the Québec airport. It held similar contracts with other companies when it was awarded the contract covering Nationair's operations at Mirabel. That contract took effect on November 4, 1990.

At the beginning of November 1990, Sylvie Bolduc, M.Y.'s general manager at Mirabel, hired passenger agents in order to perform its Mirabel contract. However, the majority of agents were chosen by a selection committee comprised of Ms. Bolduc, Suzanne Blanchette and an outside consultant. The committee met with the candidates after Ms. Bolduc did a pre-screening based on the job applications received. Some 75 applicants were interviewed. Interviews were held at the end of November 1990.

At the interview, professional training, experience and personal suitability were some of the criteria evaluated using a predetermined scale. The interview lasted 15 to 20 minutes. The decision was made by the committee immediately following the interview. In case of disagreement, Ms. Bolduc was to make the final decision; however, that situation never arose.

Some former Sol-Air employees, the majority of who had submitted a job application to M.Y., either individually or collectively, were hired; others were not. Line Picard, union president, was in the latter group. The circumstances of her interview were unusual. Yvan Blanchette, then president of M.Y., greeted her when she arrived at M.Y.'s office for the interview. He personally introduced her to the committee members as the president of the passenger agents at Sol-Air and he stayed for the interview. This was the only time that Mr. Blanchette attended an interview and actively participated in it. The content of the interview did not really differ from that of the interviews of the other candidates, although Ms. Picard's union activities were discussed, in particular the reasons why she had decided to play an active role in the union at Sol-Air.

The committee members were surprised at her genuine interest in holding a low paying job like that of passenger agent, given her general (or academic) background. At the end of the interview, Mr. Blanchette told her that he would call her. He did not. Ms. Picard telephoned him in the ensuing days. He then told her that he had heard only good things about her but that, in view of her union activities, he could not hire her. He suggested to her that she give it some time, "let the dust settle," after which they would take another look at the situation. Mr. Blanchette did not testify, and counsel for M.Y. admitted that Mr. Blanchette had made those remarks. Ms. Picard stated that Louise Atto, a former Sol-Air supervisor and now M.Y. manager at Mirabel, had made similar remarks to her in February 1991.

Moreover, in October, shortly after M.Y. was awarded the contract, three Sol-Air employees went to see Mr. Blanchette in their capacity as union representatives. They wanted to discuss M.Y.'s hiring of former Sol-Air employees.

Mr. Blanchette apparently told them that employees would be hired on merit. The three employees were not hired. The circumstances of and reasons for their rejection were not, however, explained to the Board. Eric Moirat, former union vice-president and member of the bargaining committee at Sol-Air, was himself hired by Ms. Bolduc in mid-November 1990. He subsequently occupied the position of shift supervisor. Some 25 former Sol-Air employees were hired by M.Y. as passenger agents or supervisors.

Ms. Bolduc testified that M.Y. had not consulted Nationair regarding the choice of its passenger agents, including former Sol-Air employees, and had not been swayed in this process either by Nationair or by Sol-Air.

7. In the meantime, in July 1990, the Teamsters applied for certification to represent M.Y. employees. At the time, M.Y. was responsible for operations at the Québec airport only, where it held contracts with a number of carriers, including Nationair. On September 10, 1990, the Board issued a certification order describing the following unit:

"all employees of M.Y. Air Sol Services Inc., excluding clerical employees, supervisors and those above the rank of supervisor."

The Teamsters then began negotiations with M.Y., and a collective agreement was signed on June 14, 1991. M.Y. applied this agreement to all its passenger agents, both in Québec and at Mirabel.

8. On September 1, 1991, M.Y. transferred to Servisair its contract with Nationair to provide passenger agent services at Mirabel. That transfer followed a reorganization of M.Y.'s business which, among other things, saw Yvan Blanchette become the sole shareholder in Servisair. That company has been operating the passenger agent services at

Mirabel since September 15, 1991 with former M.Y. employees. A collective agreement covering the period from September 30, 1991 to December 31, 1993 was signed, and Servisair voluntarily recognized the Teamsters as bargaining agent.

Nationair agreed to this transfer and intervened to indicate formally its approval.

III

Arguments of the Parties

1. The union, relying on the main facts submitted in evidence, argued that because of the nature of the work performed by Sol-Air employees, and subsequently by M.Y. employees, and the terms and conditions governing the performance of this work, those employees were employees of Nationair which was in fact the real employer. In this regard, the first question the Board had to answer was of the same nature as the one that was raised in the context of the application for certification to represent the flight attendants and that gave rise to the decision in Nationair (Nolisair International Inc.), supra.

However, the circumstances in which this question must be answered differed from those of the flight attendants because, in the instant case, the union was seeking a review of the certification order of June 1989. According to the union, between 1988 and 1990, the terms and conditions under which the passenger agents performed their duties were changed and evolved in such a way that Nationair must be declared the real employer and the certification order amended accordingly. It cited, in support of that argument, the role and work of Nationair supervisors, in particular the authority they exercised over the passenger agents,

which demonstrated that Nationair was the real employer. Moreover, the fact that the passenger agents wore the Nationair uniform, worked on Nationair's premises, and used its equipment and administrative documents were all evidence that associated those employees with Nationair, not with Sol-Air.

The union also filed subsidiary applications. It alleged that if Nationair was not the real employer, it constituted, together with Sol-Air or with M.Y., a single business and a single employer. If its initial and subsidiary arguments were incorrect, then it maintained that awarding the passenger agent services contract to M.Y., in 1990, constituted a sale of business within the meaning of the Code. Moreover, given the circumstances in which the contract was entered into, it constituted an unfair labour practice. Although Nationair alleged that economics and sound management were the sole considerations that entered into its decision to award the contract to M.Y., the union, however, viewed this action as an unlawful manoeuvre designed to prevent it from continuing to represent the passenger agents for whom it was certified, thereby favouring the Teamsters which were already certified in respect of M.Y. In this regard, the union argued that the certification order of September 10, 1990 issued to the Teamsters was unjustly obtained and that the Board must revoke it. Moreover, the fact that M.Y. entered into negotiations with the Teamsters, in the wake of that certification order, also constituted an unfair labour practice. Finally, the union argued, the laying off in November 1990 of Sol-Air employees and the refusal to continue to employ those persons constituted unfair labour practices on the part of Nationair and/or Nationair and M.Y.

The union argued that Sol-Air's refusal to sign the collective agreement constituted bad faith bargaining because the agreement in principle reflected, with the exception of a few technical defects that needed correcting, the basic elements of the agreement reached by the parties on the final content of the collective agreement. The loss of the contract on October 4, 1990 could not constitute a valid excuse for refusing to sign the collective agreement, especially in the circumstances in which this refusal occurred.

2. Generally speaking, the employer's arguments can be summarized as follows.

First, it alleged that the union could not now, by way of an application for review, seek to change the employer to which it had agreed in January 1988 and which the Board had sanctioned in June 1989. No new facts, in particular no change in the terms and conditions under which the passenger agents performed their duties, supported a finding that Nationair was now the real employer, when, by the union's own admission, such was not the case in January 1988. Moreover, the fact that the union entered into and continued negotiations with Sol-Air showed that it considered Sol-Air the sole and real employer of the passenger agents.

Furthermore, there was no evidence to support a finding that Nationair and Sol-Air, or Nationair and M.Y., constituted single businesses and single employers. They were separate businesses, each of a different nature, with no common ownership and no common direction and control of their respective operations. The fact that, at one point, Nationair invested in a company belonging to Marc Solignac, president of Sol-Air, revealed nothing more than the

existence of a financial relationship in the normal course of business.

Regarding the applicant's conclusions with respect to a sale of business, Nationair argued that it had never operated the passenger agent services and that no sale of business could have occurred between it and the subcontractors.

M.Y., for its part, stressed that it had obtained its contract through the public tendering process and that there was no legal nexus between it and Sol-Air.

As for the allegations of unfair labour practices, Nationair had no comment, given its claims concerning the identity of the real employer and its contention that there is no single business or single employer.

M.Y. denied all allegations of unfair labour practices. Although it acknowledged the accuracy of Yvan Blanchette's reported remarks to Ms. Picard about hiring her, it argued that those remarks must be put in their proper context and assessed by asking whether they were motivated by anti-union animus, which was not the case.

Sol-Air, for its part, replied that its refusal to sign the collective agreement did not constitute bad faith bargaining. The company received the collective agreement, signed by the union, on the very day it was informed that it had lost the Nationair contract. The agreement, as drafted, contained provisions with which Sol-Air did not agree. It did not sign it and subsequently proposed additional provisions to the union, provisions which the union rejected. Had the union accepted them, Sol-Air would have signed the collective agreement. Given all these

circumstances, argued Sol-Air, it had not bargained in bad faith.

IV

Decision

Several questions were put to the Board in this case and it will dispose of them in the following order. Is the application for review filed pursuant to section 18 admissible? Who is the real employer of the passenger agents? Is there a single business and a single employer and, if so, are declarations under section 35 of the Code appropriate? Is there reason to grant the orders sought against the Teamsters, Nationair and M.Y. relating to the order of September 10, 1990? Was there a sale of business between Nationair and M.Y. and between M.Y. and Servisair? Did Sol-Air breach its duty to bargain in good faith? Were sections 94 and 96 of the Code contravened?

1. Is the application for review admissible?

That question was raised by all parties involved. They all argued that what we have here is an application for reconsideration that must, according to past Board decisions, meet certain conditions, in particular those set forth in Canadian National Railways (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41); Wholesale Delivery Service (1972) Ltd. (1978), 32 di 239; and [1979] 1 Can LRBR 90 (CLRB no. 154); CJMS Radio Montréal (Québec) Ltée (1979), 34 di 803; and [1980] 1 Can LRBR 170 (CLRB no. 183); and Pacific Western Airlines Ltd. (1983), 52 di 178; and 5 CLRBR (NS) 260 (CLRB no. 444).

What we have here is not an application for reconsideration of a recent decision, which would be in the nature of a request for revocation of judgment. This application does not allege that the Board committed any errors of fact or of law in June 1989, or that facts existed at the time of the original application that, had they been proven, could have altered the Board's decision. This application calls upon the general power of review conferred on the Board by section 18 and seeks to amend a part of the certification order of June 1989, i.e. the designation of the employer. There is no strict time limit for filing this type of application.

The union alleged that the facts which led it to agree to Sol-Air's being designated employer of the passenger agents in January 1988 no longer apply because the terms and conditions under which the passenger agents perform their duties were altered between 1988 and 1990, with the result that Nationair became, and still is, the real employer of the passenger agents. The union must satisfy the Board that there is merit to its present allegations if it wishes to have the certification order amended.

For these reasons, the application for review as presented is admissible, and the Board will deal with its merits in these reasons.

2. Who is the real employer?

The background and chronology of events are factors the Board had to consider in rendering the decision. First, the Board finds that the union validly gave its consent in 1988 to Sol-Air's being designated the employer. Mr. Leclerc gave the reasons why the union is seeking to amend the original application, namely, the evolution of the passenger

agents' duties between June 1987 (when the application for certification was filed) and January 1988, and the anticipated lengthy legal debate that disagreement over the identity of the employer would have generated at that point. That decision was taken by the union after the Board issued its reasons in Nationair (Nolisair International Inc.), supra, in which it declared that Nationair was the employer of the passenger agents provided by Sol-Air.

Second, the union pointed to the possibility that, at the time, it was misled or it was the victim of misrepresentation concerning the nature of the duties, and this, it alleged, led it to amend its application for certification. That allegation, however, was not proven and is not supported by Mr. Leclerc's testimony.

The Board must therefore decide whether the employer of the passenger agents in January 1988, namely Sol-Air, lost this status to Nationair, specifically as the result of the changes that are alleged to have been made to the employees' duties. According to the union, the nature of and procedures governing the control and direction exercised by Nationair establish that it is the real employer.

The union has not persuaded the Board that Nationair was, and still is, the employer of the passenger agents. It did not establish that, between 1988 and 1990, Nationair became their employer. The evidence shows that, although Sol-Air operates a business whose activities are necessary and complementary to Nationair's operations, until November 1990 it possessed the attributes of an employer within the meaning of the Code.

The facts of this case are different from those that led the Board to decide that Nationair was the employer of the

passenger agents provided to it by the same business in 1986. There are two distinguishing features. First, the terms and conditions of the successive contracts between Nationair and Sol-Air concerning the passenger agents evolved in such a way that Nationair has fewer opportunities to intervene in the selection and training of the agents. Second, this evolution in the content of the contract, which might be of little consequence were it not accompanied by concrete examples, establishes that the organization and control of the work of the passenger agents rests primarily with Sol-Air.

Sol-Air is a company that has its own organization, its own management and supervisory personnel and passenger agents. Between 1988 and 1990, Sol-Air was responsible for hiring, dispatching, scheduling and paying these employees. Ultimate responsibility for their training rested with it, even though Nationair representatives sometimes got involved in certain training-related matters. Sol-Air was also responsible for discipline. The evidence did not establish that discipline during this period was meted out at the suggestion or request of Nationair. The same is true of the decisions to lay off and recall employees in a predetermined order even though fluctuations in personnel are obviously dependent on fluctuations in Nationair's operations.

Sol-Air must meet Nationair's requirements and respect Nationair's flight schedule in determining passengers agents' hours, ensuring that enough agents are on duty at the times determined by Nationair. This is inherent in the contract. The fact that Sol-Air must also meet performance and quality standards set by Nationair likewise does not seem excessive in the context of this case. In this regard, the interventions, some more extensive than others, by Nationair supervisors in how passenger agents perform their

duties are not, in the instant case, such as to deprive Sol-Air of its employer status.

The role of Nationair supervisors and the impact of the performance and quality standards on Sol-Air's operations may indicate common direction and control, about which we will have more to say later, but they do not have the effect of depriving it of its employer status within the meaning of the Code.

Consequently, the situation that existed between 1988 and 1990 with respect to passenger agents is different from that which prevailed in 1986 as regards passenger agents supplied by Sol-Air to Nationair, when the Board had refused to recognize Sol-Air as the employer.

For these reasons, the Board finds that Sol-Air is the employer, within the meaning of the Code, of the passenger agents who work in Nationair's operations at Mirabel. This decision also applies to M.Y. and Servisair.

3. Is there a single business and a single employer and is a declaration under section 35 of the Code appropriate?

Section 35 of the Code reads as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

In disposing of the application filed pursuant to this section, the Board took into consideration, as it did in dealing with the previous question, the background and chronology of events.

The Board concluded that even if it found that Nationair and Sol-Air, or Nationair and M.Y., or Nationair and Servisair, constitute a single business and a single employer, it would not exercise the discretion conferred on it under section 35 and would not make a declaration to that effect. In reaching that conclusion, the Board took into account the following facts.

1. The union's failure to raise until now the facts and circumstances on which it based the application filed on November 2, 1990 and of which it had long been aware.
2. The union's conduct during the original certification process, i.e., the designation of the employer in the application for certification of June 1987 and the changing of this designation in January 1988 for the reasons given to the Board, reasons that related not only to strategy, but also to the conditions under which passenger agents performed their duties.
3. The continuation of the collective bargaining process with Sol-Air, resulting, after several bargaining and conciliation sessions, in the conclusion of an agreement in principle which was ratified by the employees.
4. The fact that the union did not inform Sol-Air and Nationair of its intention to file an application for a declaration under section 35. At no time after the

issuing of the certification order, or during negotiations, in particular when its demands for parity with Nationair employees as regards certain working conditions were rejected, did the union give any indication of its intention to use the Code to establish its claims. Instead, it decided to amend its demands and abandon what had been considered, at the outset, one of the major objectives of bargaining.

5. The certification of the Teamsters in September 1990 and the conclusion of a collective agreement with M.Y. for the group of passenger agents.

There is no doubt that Sol-Air's losing the contract prompted the union to appeal to the Board.

Losing this contract, just when an agreement in principle had been reached and the collective agreement was about to be signed, might be viewed as an attempt to circumvent the full application of the Code. However, awarding the passenger agent services contract to a company that has been working in this field for several years, that holds contracts with other airlines besides Nationair, and whose employees are unionized, dispels this notion. The union did not establish that the Teamsters' campaign to organize M.Y. employees at the Québec airport in June 1990, which resulted in the granting of certification in September 1990, was the outcome of a plot whose ultimate purpose was to ensure that, should M.Y. be awarded the contract to provide Nationair with passenger agents at Mirabel, the Teamsters would already be in place. If this were the case, no proof to this effect was adduced, even though it was established that Nationair's vice-president of human resources had dealt with the Teamsters before he came to work for Nationair.

The union officers explained that the purpose of bargaining with Sol-Air was to secure better working conditions for the passenger agents. To this end, the union did what it had to do. Sol-Air and Nationair acted accordingly. However, when faced with a new situation, the union reacted. It was convinced that anti-union animus played a role in the loss of the contract, which was contrary to the Code, and that Nationair was directly responsible for this situation, not only because awarding the contract to another company required its intervention, but also because, in its opinion, Nationair constituted, together with the subcontracting company, a single business and a single employer.

On the strength of these arguments, the union seeks remedial action. To this end, a section 35 declaration would be a means of establishing a link between it and Nationair and of then obtaining redress for what it considers unlawful conduct. In The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60), the Board reaffirmed the remedial nature of section 35:

"In addition to the criteria discussed above, there must be an evident purpose, in terms of industrial relations, for the Board to join together companies it finds related and under common direction and control. A declaration under Section 133 is not merely an academic exercise. The interest of the employees concerned and sound labour-management relations must warrant a Board finding in this area."

(pages 45; 359; and 442)

In Beam Transport (1980) Ltd. and Brentwood Transport Ltd. (1988), 74 di 46 (CLRB no. 689), it added the following:

"One of the industrial relations purposes of section 133 is to discourage employers from escaping collective bargaining responsibilities by, for example, shifting work from one employing entity which is unionized to another, alternative employing entity which is not, where both are under 'common control or direction.'"

(page 48)

In The Canadian Press, supra, the Board also made clear the following:

"It should be re-emphasized that the Board has discretionary powers in declaring two or more employers to be a single employer carrying out, for purposes of the Code, a single federal work, undertaking or business. Even if all criteria used by the Board in its evaluation are met, the Board is under no obligation to make such a declaration. The Board's discretion is exercised on the basis of ensuring the rights of employees to be represented by the trade union of their choice in a bargaining structure conducive to 'effective industrial relations' and 'sound labour-management relations'. There may indeed be circumstances where a declaration made possible under Section 133 would be inappropriate and not only not supportive of the objectives of the Canada Labour Code, but contrary to them. If, for example, there were existing bargaining rights which might be infringed upon by the Board exercising its powers or if the impact of such declaration on the parties involved, or indeed other parties, would be demonstrably deleterious, the Board would certainly hesitate to act, no matter what the weight of the evidence concerning commonality of undertaking."

(pages 46-47; 360-361; and 442)

The union filed its application for a declaration on November 2, 1990, when it realized that the situation it had accepted in recent years was having consequences that it had perhaps anticipated, but that it had taken the risk of accepting. This acceptance itself created a factual situation that has consequences for third parties: employees, unions and employers. In this sense, the Board believes that the timing of the union's application is an important consideration in deciding whether to exercise its discretion. In Calgary Television Limited and Lethbridge Television Limited (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRBR no. 118), it had the following to say on the subject:

"The union submits the timing of a request for a declaration under section 133 should not be considered by the Board. We disagree. Its timing is directly tied to the purpose for which the declaration is sought. It is certainly crucial to the invocation of section 133 for the primary purpose for which it was enacted. ... In

this case, its use could have had no other effect than disturbing the stable, long-term relationship at Calgary. The Board did not and does not consider that effect to be in furtherance of the objects of the Code; therefore, it affirms the original decision not to exercise its discretion under section 133."

(pages 405; and 537)

The union had long been aware of the facts on which it relies in seeking the Board's intervention. Such was not the case in Music Mann Leasing Ltd., Bus Drivers (London) Inc. (1982), 51 di 51; and [1982] 2 Can LRBR 337 (CLRB no. 381), in which the Board said the following:

"... [since] the union was kept in the dark until the contract was finally settled, we find that the union's delay in proceeding before the Board should not influence us in the exercise of our discretion."

(pages 57; and 342)

The Ontario Labour Relations Board has also considered the question of the timing of an application. In Andreynolds Company Limited, [1990] OLRB Rep. Nov. 1107; and (1990), 10 CLRBR (2d) 130, the Ontario Board reiterated the following:

"33. ... The Board's refusal to exercise its discretion in favour of a section 1(4) applicant by reason of the applicant's delay is well established...."

34. The past jurisprudence of the Board does address the issue in terms of whether the union knew or ought reasonably to have known. The Board's past jurisprudence has also imposed a 'due diligence' test on trade unions and their representatives."

(pages 1113; and 138)

For these reasons, there is no need for this Board to decide whether Nationair and the other employers involved are a single business and a single employer because, even if it were to answer yes to this question, the Board, given the circumstances of this case, would not make a section 35 declaration.

4. Is there reason to grant the orders sought against the Teamsters, Nationair and M.Y. relating to the order of September 10, 1990?

The union is asking, first, that the certification order issued to the Teamsters on September 10, 1990 be revoked. No evidence was presented that would support a finding that this order was obtained unlawfully or improperly. This application is therefore dismissed.

The applications for orders declaring that the Teamsters contravened sections 95(a) and (b) of the Code, by trying to force M.Y. to negotiate a collective agreement when they allegedly did not have bargaining agent status or when they knew (or should have known) that another bargaining agent represented the employees of the bargaining unit sought, and those for orders declaring that M.Y. and Nationair contravened section 94(3)(g), must be examined in the light of what follows.

The Teamsters entered into collective bargaining with M.Y., the employer designated in the certification order, in accordance with the Code. Similarly, M.Y. began bargaining with the certified bargaining agent. Since Nationair was not the employer of these employees, it was not therefore bound by any obligation and had not contravened any of the relevant provisions of the Code. The parties fulfilled their obligations under the Code, and the applications for orders are therefore without merit.

5. Was there a sale of business?

The facts necessary to answer this question are as follows. Nationair has never operated the part of the business that consists of providing passenger agent services, and when

Sol-Air entered into its first contract with Nationair, it succeeded another contractor. It was during the performance of this contract that Sol-Air employees unionized. Finally, Nationair terminated its relationship with Sol-Air and awarded the contract to M.Y. following a call for public tenders.

The union alleged that this transfer by Nationair to M.Y. of the contract held by Sol-Air constitutes a sale of business within the meaning of the Code. It argued that Nationair first sold a part of its business to Sol-Air when they entered into the first contract. This part of the business allegedly reverted to Nationair when its contract with Sol-Air expired and was then sold by Nationair to M.Y. In support of this argument, it relied on Bradley Services Ltd. et al. (1986), 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRB no. 570), where the Board found that a sale of business could occur when an employer transfers a part of its business to a contractor for a given period, at the expiration of which it then transfers that business to another contractor.

Section 44 of the Code reads as follows:

"44.(1) In this section and sections 45 and 46, 'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."

Section 46 confers on the Board the power to deal with any question that may arise as to whether a business has been sold and as to the identity of the purchaser.

Although we concur in the Board's decision in Bradley Transport, supra, we cannot apply it to the facts of the present case, as the union suggests. An important distinction precludes our doing so. In this case, Nationair, unlike Reimer in Bradley Transport, supra, has never operated the part of the business allegedly sold and has never been the employer of the unionized employees employed in this part of the business or about to be so employed.

This fact, which differentiates the two cases, also precludes our finding that a sale of business took place when we analyze the transaction between Nationair and M.Y., using the method developed by the Board in Halifax Grain Elevator Limited (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867). In that case, after adopting the notion of business as central to section 44, the Board identified the conditions that must obtain in order for it apply:

"For the Board to find that a sale of business has occurred, it must answer four questions, in the following order:

1. Is the alleged buyer indeed operating a federal business or 'going concern'?
2. Was the alleged seller indeed operating or otherwise controlling as his own that said

federal 'going concern' in whole or in part before the sale took place?

3. *Were union bargaining rights in some way tied to the seller's business or part thereof that was presumably sold?*
4. *Has there been an actual sale or transfer of that same business or part thereof to the buyer?*

What the definition of business found in section 44 does is for the most part to refer us back to section 2(h) of the Code, adding that a part of such a federal business will also be considered as the whole under section 44 et seq. For the rest, section 44 does not expand on the actual contents of the notion of business or undertaking."

(pages 46; 195; and 14,393)

In the instant case, the first condition poses no problem. It is not disputed that the buyer, which would be M.Y., was operating, when the application was filed, a federal "going concern." It has since transferred the business to Servisair. This transfer is another aspect of the question with which we will deal later.

The same, however, cannot be said of the second condition. It raises the question of similarity between the buyer's business and the alleged seller's business. Did this seller previously operate what now constitutes the buyer's business or a part thereof? We have to answer no to this question. Nationair, which the applicant alleged to be the seller, was not operating, when the contract was transferred, and never operated, the passenger agent services. This part of the business was not under its control. Sol-Air had previously operated it, and had in turn succeeded other contractors who had operated it. Consequently, Nationair did not sell the business to M.Y. and there was no sale of business within the meaning of the Code. This application is therefore dismissed.

The second application, filed pursuant to section 44 by the Teamsters, seeks a declaration that the transfer of the contract held by M.Y. to Servisair constitutes a sale of business within the meaning of the Code. Servisair did not deny that it succeeded M.Y. as the employer of the employees belonging to the bargaining unit represented by the Teamsters.

The union, for its part, objected to the designation of the Teamsters as the bargaining agent of the employees concerned. It based its objection on the conclusions sought in its applications for review and for a declaration of single employer, in which it claimed that it holds the bargaining rights for the passenger agents working at the Nationair counter at Mirabel, regardless of who their employer is. It also made this claim in the unfair labour practice complaints in which it alleged that the Teamsters unlawfully obtained the certification order to represent M.Y. employees.

Given our decisions on the designation of the employer and the decision to dismiss the applications seeking orders against the Teamsters, Nationair and M.Y. relating to the certification order of September 10, 1990, there is no need to decide the merits of the union's arguments.

The Board allows the application for a declaration of sale of business between M.Y. and Servisair. The certification order held by the Teamsters will be amended accordingly.

6. Did Sol-Air breach its duty to bargain in good faith?

Sol-Air refused to sign the collective agreement, arguing first that it could not afford the retroactive pay and the new rates of pay after it lost its contract. However, it

proposed alternatives and asked the union, first, to forego the retroactive pay and, second, not to sign the collective agreement until November 3, the expiry date of the contract, which would avoid its having to pay the new rates to take effect with the signing of the agreement. It also asked that the collective agreement apply to the supervisors and replacement workers during job actions, claiming that it wanted to give them protection following the loss of the contract. At no stage of the negotiations was this matter discussed.

The Code requires the parties to bargain in good faith and to make every reasonable effort to enter into a collective agreement. In this sense, it does not force them to come to an agreement. However, once an agreement is reached, a party cannot refuse to sign the collective agreement for reasons such as those alleged here, or subject the signing of the agreement to conditions not previously negotiated.

In the instant case, the employer's argument concerning its inability to pay does not justify its refusal. Sol-Air chose to carry on its business activities as a subcontractor. In the aviation industry, subcontracting is not a rare phenomenon, and Sol-Air was not in a unique situation in this regard. It knew that its contract had a set term and had known since August that Nationair had issued a call for tenders for the renewal of this contract. It never informed the union of this new fact and of its possible consequences over the very short term. It was well aware of all the factors that could affect its obligations as an employer during collective bargaining.

It had to be sure, when it made commitments during negotiations, especially those of a financial nature or having retroactive effect, that it was capable of living up

to them. When the agreement in principle was reached on September 13, the employer, if it was bargaining in good faith, had to have the resources necessary to apply the terms and conditions as soon as the agreement was signed, or at least had to be certain it would have them by that time. In other words, if, on September 13, the employer had not already made the financial arrangements (with Nationair or elsewhere) necessary to meet its commitments, then one has to conclude that, on this date, it entered into an agreement not knowing whether it could apply it. It bargained superficially and without commitment. Subsequent events confirm this. The employer never indicated, before September 13, that the agreement or the signing of the collective agreement was subject to any condition or approval whatsoever. When, in mid-October, the employer gave its inability to pay as the result of losing the contract as an excuse for refusing to sign the collective agreement, it bargained in bad faith.

In Le Droit, [1988] OLBR. Rep. Apr. 412, the Ontario Labour Relations Board decided, in similar circumstances, that the employer's refusal to sign the collective agreement constituted bad faith bargaining.

In that case, the employer was bargaining with three bargaining units. It reached an agreement in principle with the journalists. After the final text had been revised, the journalists ratified the agreement and rescinded a resolution authorizing strike action. A signing date was then set. The employer put off signing the agreement a number of times. Finally, the union learned that, although the employer accepted the text of the collective agreement, it was refusing to sign it. It claimed that the threat of a strike was still hanging over the company because negotiations with the other two bargaining units were still

ongoing and that financial problems could result from a strike, if called, when the company was having financial difficulties which it had been experiencing for a number of years. The Ontario Board said the following:

"14. Neither the deteriorated financial condition of Le Droit nor the possibility of a strike in the winter of 1988 were unknown to either party during these negotiations. Both factors figured prominently in the timing and terms of the January 26th agreement. Nor did the union's December 8th resolution, when disclosed to the company, divert the process or the company's willingness to pursue it to its signed conclusion. Both parties, knowing of this resolution, the precarious finances, and the possibility of a strike, had nonetheless concluded every term and word of an agreement and were anxious to have it signed at the earliest, logistically feasible moment. There was no change in circumstances, or unforeseen obstruction; rather, one of the potential scenarios surfaced with the strike vote, intensifying rather than exposing a critical situation. The bargain was made in the shadow of this pending crisis, but made nevertheless. Having been made, the section 15 duty to bargain in good faith and make every reasonable effort to make a collective agreement was violated by the company when it refused the agreement's execution because its hopes for a domino strategic effect on the two other units were thwarted. The Board's jurisprudence clearly indicates that where, in circumstances such as these, the parties have bargained for and agreed to all the terms of a collective agreement, it is a violation of section 15 for the company to resile from that agreement. ..."

(page 414)

Unlike that case, the union in the instant case did not know all the important factors, in particular that the contract binding the employer to Nationair was subject to the tendering process. The union concluded an agreement in principle, believing, as it must, that the employer was making commitments that it was capable of fulfilling. This attitude is normal. A party cannot be expected to confirm, assuming that it is able to do so, the validity of all the commitments made by the other party at the bargaining table.

With regard to the additional conditions affecting the inclusion in the bargaining unit of the supervisors and

replacement workers, these matters were never discussed before the agreement in principle was reached. The Board has in the past characterized such conduct as bad faith bargaining (see Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRBR no. 448)).

The employer argued that the text that the union signed on October 1 and submitted to it on October 4 did not fully reflect the agreement reached by the parties. No specific details in this regard were presented to the Board, but the employer apparently wanted some minor or technical changes made to the text. At no time did the employer claim that the text submitted by the union did not reflect the basic elements of the agreement in principle of September 13. However, the employer refused to implement the agreement it had concluded by refusing to sign the collective agreement.

In the circumstances established by the evidence, the Board finds that Sol-Air bargained in bad faith.

7. Were sections 94 and 96 contravened?

The union alleged that Nationair, Sol-Air and M.Y. contravened, in various ways, certain provisions of sections 94 and 96, specifically by dismissing or refusing to hire the persons who had worked for Sol-Air until November 1990.

The decisions relating to the identity of the employer and to the application, in the instant case, of section 35 of the Code preclude our granting the relevant applications, with the exception of the one concerning M.Y.'s refusal to hire Line Picard.

The circumstances in which M.Y. refused to employ Ms. Picard constitute a violation of section 94(3)(a)(i) of the Code. The employer gave only one reason for its refusal: Ms. Picard was a union officer, in this case president of the union that represented the employees of M.Y.'s predecessor. Refusing to employ a person for this reason constitutes a direct violation of section 94(3)(a)(i) which reads as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."

(See in particular Ancon Corporation Security and Investigation Limited (1981), 43 di 47; and [1981] 2 Can LRBR 137 (CLRB no. 297); Scotian Shelf Traders Limited (1983), 52 di 151; 4 CLRBR (NS) 278; and 83 CLLC 16,070 (CLRB no. 437); and Woodward's Limited (1986), 65 di 65 (CLRB no. 567).)

For these reasons, the Board finds that M.Y. contravened section 94(3)(a)(i) of the Code when it refused to employ Ms. Picard.

Given our decision that there was a sale of business between M.Y. and Sol-Air, the Board declares that Servisair is bound by that decision under section 44(2)(d) of the Code which reads as follows:

"44.(2) Subject to subsections 45(1) to (3), where an employer sells his business,

...

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."

In this regard, see Ronald Guy (1985), 60 di 142; and 86 CLLC 16,007 (CLRB no. 511); and Carbec Inc. (1985), 62 di 127 (CLRB no. 528).

V

General Findings

For all these reasons, the Board makes the following findings.

1. The application for review of the designation of the employer in the certification order of June 1, 1989 is admissible.
2. Sol-Air is an employer within the meaning of the Code, and the certification order of June 1, 1989 shall not be amended to substitute Nationair as the employer.
3. There is no need to deal with the merits of the applications for a declaration of single business and single employer because, even if the issue were decided in the affirmative, the Board would not make a section 35 declaration.
4. The unfair labour practice complaints made against the Teamsters, Sol-Air and M.Y., relating to the certification order of September 10, 1990, are dismissed.

5. The unfair labour practice complaints made under sections 94 and 96, against Nationair, Sol-Air and M.Y., are dismissed, except for Line Picard's complaint against M.Y. and involving Servisair following the sale of business between M.Y. and Servisair. Accordingly, the Board:

- allows Line Picard's complaint filed following M.Y.'s refusal to hire her during the selection process to find passenger agents to perform the passenger agent services contract for Nationair at Mirabel, in November 1990;
- orders Servisair, Sol-Air's successor employer, to hire Ms. Picard immediately as if she had been transferred to its employ at the same time as the other M.Y. passenger agents;
- orders M.Y. and Servisair, jointly and severally, to pay Ms. Picard compensation equivalent to the pay and other benefits she lost as the result of this refusal to employ her, this compensation to run from the date of the refusal until the date of her hiring.

5. The section 44 application filed by the union for a declaration of sale of business between Nationair and M.Y. is dismissed.

The section 44 application filed by the Teamsters for a declaration of sale of business between M.Y. and Servisair is allowed. The Board declares that there was a sale of business between M.Y. and Servisair, and a formal order will be issued accordingly.

6. The section 50(a) application filed by the union is allowed. The Board finds that Sol-Air breached its duty to bargain in good faith when it refused to sign, in October 1990, the collective agreement. Accordingly, the Board orders the following:

- Sol-Air shall cease contravening section 50(a) of the Code.
- Sol-Air shall submit in writing to the union, not later than October 7, 1992, to the attention of Line Picard, the amendments to be made to the draft collective agreement signed by the union representatives on October 1, 1990, amendments that it would have presented on October 4, 1990 had it not lost the contract. A copy of these amendments shall be sent to the Board.

If the union accepts the amended text of the collective agreement, it shall so inform the employer and the Board not later than October 14, 1992. The employer shall then sign the collective agreement not later than October 20, 1992.

- Sol-Air shall pay the amounts owed retroactively, in accordance with articles 22 and 28.02 of the draft collective agreement of October 1, 1990, not later than October 30, 1992.

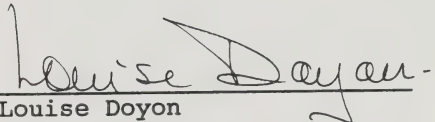
The obligation to pay the new rates of pay set out in article 28.02 ceases on the date on which the contract binding Nationair and Sol-Air expired.

- Should the parties fail to agree on the final text of the collective agreement, negotiations

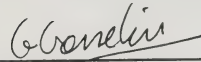
will resume immediately and the Board reserves the right to intervene again. If the parties do not enter into a collective agreement within 30 days following the date of this decision, the Board will again summon Sol-Air and the union to a public hearing.

The Board appoints Ms. Suzanne Pichette, Director of its Montréal regional office, or any other officer she may designate, to assist the parties in implementing these remedies.

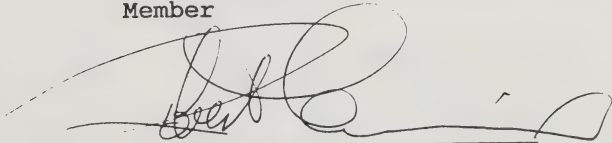
This is a unanimous decision.



Louise Doyon
Vice-Chair



Ginette Gosselin
Member

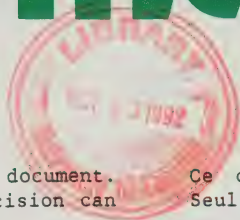


Robert Cadieux
Member

ISSUED at Ottawa, this 29th day of September 1992.

CCRT/CLRB - 960

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Summary

SEAFARERS' INTERNATIONAL UNION OF
CANADA, APPLICANT UNION, AND ROWAN
CANADA LIMITED, EMPLOYER.

Board File: 555-3408

Decision No.: 961

The Board considered an application
by the Seafarers' International
Union of Canada for certification
as the bargaining agent for certain
employees of Rowan Canada Limited
working on a drilling unit /
production platform in the offshore
petroleum-producing area of Nova
Scotia.

The issue for the Board to decide
was whether it had any jurisdiction
to entertain and deal with the
application in the light of the
provisions of the Canada-Nova
Scotia Offshore Petroleum Resources
Accord Implementation Act, S.C.
1988, c. 28.

The employer, Rowan Canada, argued
that the Nova Scotia Implementation
Act does apply and that it makes
the Canada Labour Code (Part I -
Industrial Relations) inapplicable
to the operations in question and
to the employees. The SIU took the
position that the Nova Scotia
Implementation Act does not apply
and that it is, in any case,
constitutionally invalid.

The Board concluded that the Act is
valid and that it does render the
Code inapplicable to the
circumstances of this case. The
Board decided it had no
jurisdiction to deal with the
application.

Résumé

LE SYNDICAT INTERNATIONAL DES
MARINS CANADIENS, REQUÉRANT, ET
ROWAN CANADA LIMITED, EMPLOYEUR.

Dossier du Conseil: 555-3408

Décision n° 961

Le Conseil a examiné une demande
présentée par le Syndicat
international des marins canadiens
en vue d'être accrédité à titre
d'agent négociateur de certains
employés de Rowan Canada Limited,
qui travaillent sur la plate-forme
de forage et de production, dans la
région pétrolière au large de la
Nouvelle-Écosse.

Le Conseil doit décider s'il a la
compétence voulue pour accueillir
et traiter la demande, compte tenu
des dispositions de la Loi de mise
en oeuvre de l'Accord Canada -
Nouvelle-Écosse sur les
hydrocarbures extracôtiers, L.C.
1988, c. 28.

L'employeur prétend que la loi
susmentionnée s'applique et que,
par conséquent, le Code canadien du
travail (Partie I - Relations du
travail) ne s'applique ni aux
activités en question ni aux
employés. Selon le syndicat, cette
loi ne s'applique pas et que, de
toute façon, elle est nulle du
point de vue constitutionnel.

Le Conseil juge que la loi en
question est valide et qu'elle rend
le Code inapplicable dans les
circonstances de la présente
affaire. Il décide donc qu'il n'a
pas compétence pour se prononcer
sur la demande.

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Reasons for decision

Seafarers' International
Union of Canada,

applicant union,

and

Rowan Canada Limited,

employer.

Board File: 555-3408

The Board consisted of Vice-Chairman Thomas M. Eberlee and Members Michael Eayrs and François Bastien.

Appearances

Mr. Joseph R. Nuss, Q.C. and Mr. Gordon Forsyth, for the Seafarers' International Union of Canada; and

Mr. Brian Johnston and Mr. F.V.W. Penick, for Rowan Canada Limited.

I

The Board had before it an application by the Seafarers' International Union of Canada (Seafarers' or SIU) for certification as the bargaining agent for certain employees working on drill rigs owned or operated by Rowan Canada Limited (Rowan). At the time of the application, Rowan was operating one offshore drilling unit/production platform - the "Rowan Gorilla III."

The issue for the Board to decide was whether it had any jurisdiction to entertain and deal with the application in the light of the provisions of the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28 (the Implementation Act).

The employer's position was that this legislation had made the Code inapplicable to the operation in question and to the employees for whom the SIU sought bargaining rights from the Board. The union argued among other things that the statute itself does not apply to the instant situation because it alleged that the Rowan Gorilla III is not within the offshore area for the purpose of becoming, and is not, permanently attached to, permanently anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area. Alternatively, the union maintained that section 157, and the entire Implementation Act, is a constitutionally invalid attempt to delegate legislative authority from Parliament to the Nova Scotia legislature. Under either approach, according to the union, the Board does have jurisdiction to deal with the certification application.

The Board is satisfied that the requisite notices were filed with the appropriate parties under section 57(1) of the Federal Court Act respecting the SIU's constitutional challenge of the Implementation Act.

A hearing was held in Halifax on May 26 and 27, 1992.

II

Rowan carries on the business of offshore hydrocarbon drilling and the supply of hydrocarbon production facilities. In July 1990, Rowan's parent company, Rowan Companies Inc., entered into what is described as the "Production Jack-Up Rig Contract" with a company called LASMO Nova Scotia Limited (LASMO), to furnish a mobile offshore drilling unit, the Gorilla, and the necessary labour to drill and complete exploration and development

wells and to serve as a stable platform for the production, processing, measuring and loading of hydrocarbons in connection with the Cohasset-Panuke project. The contract was for a term of five years subject to being shortened or lengthened by LASMO to correspond with the useful production life of the Cohasset-Panuke oil reserves.

The Cohasset-Panuke project is located 41 kilometres, or just over 22 nautical miles, west and south of Sable Island and within 200 nautical miles of mainland Nova Scotia. Two production licences, one in respect of the Cohasset site and one in respect of the Panuke site, were issued by the Canada-Nova Scotia Offshore Petroleum Board to LASMO and its co-owner Nova Scotia Resources (Ventures) Limited, effective April 1, 1991.

The Gorilla is an offshore mobile drilling unit with three legs that can be jacked up for transportation and jacked down into the seabed for drilling and production work. It provides living accommodations for some 90 workers. It does not provide supply or support services to any other ship, drilling unit, station, installation, or structure of any kind.

The Gorilla arrived in the offshore area in December of 1990. Its original task was to drill two exploration wells in areas outside the area encompassed by the Cohasset and Panuke licences. In April 1991, it drilled the Cohasset and Panuke production wells. In July 1991, the Gorilla headed into Halifax Harbour for modifications to install production and processing facilities so that it could process the oil from the Cohasset and Panuke wells. The modifications cost \$20,000,000, or about 25% of the original construction price of the Gorilla.

The Gorilla left Halifax Harbour on November 22, 1991 and returned to the Panuke site where it set its legs down on the sea floor and completed the drilling of the final production wells into the Panuke portion of the project reserves.

ISSUES

(1) Does Parliament have legislative jurisdiction over the "offshore area" as defined in the Implementation Act?

(2) Is section 157 of the Nova Scotia Implementation Act, ultra vires as an unconstitutional delegation of legislative authority from Parliament to the Nova Scotia legislature?

(3) Was the Gorilla within the offshore area for the purpose of becoming, or was it, permanently attached to, permanently anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area, on January 13, 1992? Or, in other words, does section 157 effectively exclude the application of the Canada Labour Code?

III

Issue No. 1

In its submission the employer presented, inter alia, the decision of the Supreme Court of Canada in Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86; and (1984), 5 D.L.R. (4th) 385, hereinafter Hibernia Reference, as authority for the proposition that Parliament enjoys all

the proprietary rights in and holds all the legislative jurisdiction over the exploitation of the natural resources of the continental shelf, while the legislature of Nova Scotia has none.

According to Rowan, the following conclusions of the Supreme Court of Canada in the Hibernia Reference apply to the Nova Scotia offshore area:

"We therefore conclude that Newfoundland could not, upon its entry into Confederation, have held rights to explore and exploit in the continental shelf by virtue of international law, because international law then conferred no such rights. Nor was it in any position to acquire such rights subsequent to Confederation.

...

The conclusion that Canada has the right to explore and exploit in the continental shelf leads easily to the conclusion that Canada has legislative jurisdiction. ... Legislative jurisdiction falls to Canada under the peace, order, and good government power in its residual capacity.

Newfoundland's legislative competence, like that of all the other provinces, is confined to legislation operating within the provinces. ..."

(pages 127-128; and 418)

The applicant, SIU, did not challenge Rowan's assertion that the conclusions of the Supreme Court of Canada in the Hibernia Reference also apply to the Nova Scotia offshore area. The Attorney General for Nova Scotia did not address this point in its written submissions. That this argument would be raised in a specific form was not included in the various notices given by the parties under section 57 of the Federal Court Act.

There is some question, however, as to whether the decision

in Hibernia Reference applies to the "Nova Scotia" offshore area. In The Offshore Petroleum Regimes of Canada and Australia, (The Canadian Institute of Resources Law, June 1989), Professor Constance D. Hunt of the Faculty of Law, University of Calgary, and Executive Director, Canadian Institute of Resources Law, wrote:

"... It will be recalled that there has been no judicial determination of jurisdiction specifically in relation to the Nova Scotia offshore; the province continues to maintain that it has jurisdiction over a large area and these specific references are consistent with the province's legal position."

(page 36)

Professor Hunt refers the reader to an article by Edward C. Foley, "Nova Scotia's Case for Coastal and Offshore Resources" (1981), 13 Ottawa L. Rev. 281, for a description of Nova Scotia's legal claim. That article was written before the Supreme Court decision in the Hibernia Reference but after the Supreme Court decision in Reference re Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792 (hereinafter the B.C. Offshore Reference).

In his article on the Nova Scotia position Edward C. Foley noted that in the B.C. Offshore Reference, the Supreme Court recognized that while British Columbia was a Crown colony, the British Crown might have conferred upon the Governor or Legislature of the colony rights to which the British Crown was entitled under international law, but that it had not granted such rights to the colony. Nova Scotia had a much different history than British Columbia (and it may be added, a much different history than Newfoundland). The principal point of distinction arises from the original grant creating the colony of Nova Scotia:

"Nova Scotia had a much different history than British Columbia. As early as 1621, James I had

made a large grant of territory, known as Nova Scotia, to Sir William Alexander. The grant not only included vast tracts of land, but large areas of the territorial sea as well. ..."

(Edward C. Foley, supra, page 284)

Foley analyzed from an historical and a legal perspective the Nova Scotia claims with respect to control and ownership of: (1) the offshore; (2) the three-mile zone; and (3) inland waters. Foley concluded that any claim based on the Alexander grant or subsequent governor's commissions, which had the force of law, could not extend beyond 40 leagues. A distance of 40 leagues, however, is a considerable distance. The Oxford English Dictionary, 1970, defines a marine league as a unit of distance equal to 3 nautical miles or 3041 fathoms. It also describes a nautical mile as 6080 feet. A distance of 40 leagues would be equal to 120 nautical miles and well in excess of 120 "regular" miles.

The article by Foley was written before the Hibernia Reference was decided by the Supreme Court. It must also be remembered, however, that the Nova Scotia claim described by Foley was based on historical grants from the Imperial Parliament and not on the Continental Shelf doctrine which was addressed in the Hibernia Reference. Nova Scotia has not relinquished its claim with respect to the "Nova Scotia" offshore. The best evidence of this can be found in sections 2, 3 and 8 of the "mirror" legislation implemented by the Nova Scotia legislature, the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act, S.N.S. 1987, c. 3; proclaimed January 5, 1990, except sections 104-120 proclaimed October 1, 1990:

"2 In this Act,

(p) 'Nova Scotia lands' means

(i) Sable Island, and

(ii) those submarine areas that belong to Her Majesty in right of the Province or in respect of which Her Majesty in right of the Province has the right to dispose of or exploit the natural resources, and that are within the offshore area;

...

3 The provisions of this Act shall not be construed as providing a basis for any claim by or on behalf of the Government of Canada in respect of any entitlement to or legislative jurisdiction over the offshore area or any living or non-living resources in the offshore area."

The offshore area is described in detail in a schedule to the Act. Section 8 makes the Act applicable to Nova Scotia lands within the offshore.

However, in spite of the hesitations of various authorities, this Board has decided to proceed on the basis that the Nova Scotia offshore does fall within the jurisdiction of Parliament. In any case, if it does not, there will be no real effect upon this decision's ultimate bottom line, as will eventually be seen herein.

IV

Issue No. 2

Section 157 of the Implementation Act reads as follows:

"157. (1) In this section,

'marine installation or structure' includes

(a) any ship, offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, and

(b) any other work or work within a class of works prescribed pursuant to paragraph (5)(a),

but does not include any vessel that provides any supply or support services to a ship, installation, structure or work described in paragraph (a) or (b);

'Nova Scotia social legislation' means the Labour Standards Code, Chapter 10 of the Statutes of Nova Scotia, 1972, as amended from time to time, the Occupational Health and Safety Act, Chapter 3 of the Statutes of Nova Scotia, 1985, as amended from time to time, the Trade Union Act, Chapter 19 of the Statutes of Nova Scotia, 1972, as amended from time to time, and the Workers' Compensation Act, Chapter 65 of the Statutes of Nova Scotia, 1968, as amended from time to time.

(2) The Nova Scotia social legislation and any regulations made thereunder apply on any marine installation or structure that is within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area.

(3) Notwithstanding subsection (2), any provision of any Act or regulation referred to in that subsection that is in relation to a matter respecting which a regulation may be made under

(a) paragraph 153(1)(d),(m),(o) or (p), or

(b) any other provision of this Act respecting occupational health or safety

does not apply on marine installations or structures referred to in subsection (2) during such time as those installations or structures are within the offshore area in connection with a purpose referred to in that subsection.

(4) Notwithstanding subsection 80(1) of the Canada Labour Code or any other Act of Parliament,

(a) Parts III and IV of the Canada Labour Code do not apply on any marine installation or structure referred to in subsection (2), and

(b) in respect of any marine installation or structure referred to in subsection (2) that is within the offshore area for the purpose of becoming, or that is, permanently attached to, permanently anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area,

(i) Part V of the Canada Labour Code does not apply, and

(ii) the Trade Union Act, Chapter 19 of the

Statutes of Nova Scotia, 1972, as amended from time to time, applies

during such time as the marine installation or structure is within the offshore area in connection with a purpose referred to in that subsection.

(5) Subject to section 6, the Governor in Council may make regulations

(a) prescribing a work or class of works for the purpose of the definition 'marine installation or structure' in subsection (1); and

(b) prescribing, for the purpose of subsection (2), any Act of the Legislature of the Province or excluding any such Act from the application of that subsection."

SIU argued, in its written submissions prior to the hearing, that section 157 of the Implementation Act constitutes an ultra vires, unconstitutional and illegal delegation of legislative authority by the Parliament of Canada to the legislature of the province of Nova Scotia. The section is tantamount to an abdication of legislative jurisdiction. Notice of this argument was given by SIU to the Attorneys General for Canada and the provinces.

At the hearing SIU enlarged its argument. It argued that the whole scheme set out in the Implementation Act was invalid, including section 157. According to counsel for the SIU, Parliament has failed to retain its authority to control, modify, or terminate the Implementation Act. It has thus abdicated its constitutional authority over the offshore. Counsel referred in particular to section 6 of the Implementation Act and argued that by virtue of this section Parliament's exercise of its authority to issue regulations under the Act is subject to the wishes of the Provincial Minister. The sovereignty of Parliament is made subject to the wishes of the Provincial government. The Implementation Act gives away exclusive legislative control

over the subject matter of the offshore and is thus constitutionally invalid. Counsel also argued that, in this case, the subject matter of the legislation in question is the offshore, which is not within the province of Nova Scotia. The province has constitutional authority over property and civil rights within the province.

Rowan and the Attorney General for Nova Scotia (hereinafter the AGNS), argued that section 157 was not constitutionally invalid. They argued that it is only delegation of legislative authority from Parliament to a provincial legislature, or vice versa, which is constitutionally invalid. Section 157 of the Implementation Act is a constitutionally valid incorporation by reference of provincial law.

In A.G. for Canada v. A.G. for Nova Scotia, [1951] S.C.R. 31 (the Nova Scotia Inter-delegation case), the Supreme Court of Canada established the principle that Parliament cannot delegate its legislative authority to a provincial legislature. As Rowan pointed out in its submissions, the legislation at issue in the Nova Scotia Inter-delegation case expressly provided for the transfer of legislative authority between the federal and provincial legislature. The impugned legislation is set out in the decision of Taschereau, J.:

"1. This Act may be cited as *The Delegation of Legislative Jurisdiction Act*.

2. The Governor in Council may, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of The British North America Act, 1867, exclusively within the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in

force, have the same effect as if enacted by this Legislature.

3. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, under the provisions of the British North America Act, 1867, exclusively within the legislative jurisdiction of such Parliament, the Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all the provisions of any Act in relation to any such industry, work or undertaking.

4. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to the raising of a Revenue for Provincial Purposes by the imposing of a retail sales tax of the nature of indirect taxation, the Governor-in-Council while such delegation is in force, may impose such a tax of such amount not exceeding three per cent (3%) of the retail price as he deems necessary, in respect of any commodity to which such delegation extends and may make regulations providing for the method of collecting any such tax.

5. This Act shall come into force on, from and after, but not before such day as the Governor-in-Council orders and declares by proclamation."

(pages 38-39)

The principle that inter-delegation of legislative authority was unconstitutional was based on the idea that inter-delegation would disturb the scheme of distribution of powers as set out in the Constitution Act, 1867. As Rinfret, C.J., stated:

"The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively

from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.

No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the British North America Act there were to be, in the words of Lord Atkin in The Labour Conventions Reference (1), 'water-tight compartments which are an essential part of the original structure.'

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word 'exclusively' used both in section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other. ..."

(pages 34-35)

The Nova Scotia Inter-delegation case has since been distinguished by the Supreme Court of Canada in a number of cases. In P.E.I. Potato Marketing Board v. Willis, [1952] 2 S.C.R. 392, the Supreme Court upheld federal legislation which authorized the Governor in Council to delegate to marketing boards established under provincial legislation powers to regulate interprovincial and export trade. Thus, "administrative" as opposed to "legislative" inter-delegation" was constitutionally valid.

The Supreme Court also distinguished between legislative "delegation" and "incorporation by reference." In Attorney-General for Ont. v. Scott and Attorney General of Canada, [1956] S.C.R. 137, the Supreme Court upheld Ontario legislation which provided for the enforcement, in Ontario, of orders to pay maintenance obtained in foreign

jurisdictions, including England, by wives who were resident in England against husbands who were resident in Ontario. The Ontario statute did not specify the defences that were available to the husbands, in Ontario. Instead, it allowed the husbands to raise any defence set out in the English statute.

The Supreme Court extended the principle of "incorporation by reference" to include "anticipatory incorporation by reference" in Coughlin v. Ontario Highway Transport Board et al.; [1968] S.C.R. 569. In Coughlin, the Court looked at and upheld section 3 of the Motor Vehicle Transport Act. Under that section, a board constituted under provincial legislation would determine whether a person could operate the undertaking of an interprovincial carrier of goods by motor carrier within the province of Ontario. The section stated that the Board, in making this decision, would be guided by the terms of the statutes of that legislature and the regulations passed thereunder as they may exist from time to time.

Professor Peter W. Hogg in Constitutional Law of Canada, Second Edition (Toronto: The Carswell Company Limited, 1985), at page 303, suggests that in order for a federal statute to validly incorporate a provincial statute, or vice versa, the incorporated law must be independently valid. He distinguishes Coughlin and the Nova Scotia Inter-delegation case on this basis.

In support of this analysis, he refers to E.A. Dreidger, "The Interaction of Federal and Provincial Laws" (1976), 54 Can Bar Rev. 695:

"The distinction between delegated and referential legislation is simply this: in the case of delegated legislation, the delegatee's

authority is derived from the delegator; but in the case of referential legislation the authority to enact the incorporated legislation is derived from the constitution and not from the other legislative body. ..."

(page 709)

He also refers to Albert S Abel and John I. Laskin, eds., Laskin's Canadian Constitutional Law, Revised Fourth Edition (Toronto: The Carswell Company Ltd. 1975), where it is stated:

"... There is no unconstitutional delegation involved where there is no enlargement of the legislative authority of the referred legislature, but rather a borrowing of provisions which are within its competence and which were enacted for its own purposes, and which the referring legislature could have validly spelled out for its own purposes. ..."

(page 3)

Judicial support for Hogg's contention that incorporated legislation must be independently valid is found in Meherally v. M.N.R., [1987] 3 F.C. 525; and (1987), 71 N.R. 260. In that decision, the Federal Court of Appeal upheld the constitutional validity of section 8(2) of the Unemployment Insurance Regulations, C.R.C. 1978, c. 1576, which adopted by reference the definition of public service employment found in the various provincial Public Service or Civil Service Acts. Urie, J., in a decision agreed with in its entirety by Huggesson, J., endorsed the following excerpt, where Driedger was commenting on the decision in King v. Walton (1906), 11 C.C.C. 204 (Ont. C.A.):

"This is not delegation. The province has exclusive jurisdiction under section 92 of the British North America Act to prescribe the qualifications of jurors in civil cases. Parliament has exclusive jurisdiction to prescribe the qualifications of jurors in criminal cases. The Criminal Code provision merely provided, in effect, that in criminal cases the rules are to be the same as in civil cases; it described the characteristics that

qualify a person to have a juror in criminal cases, and to find those characteristics one must go to the provincial law. Parliament could have repeated those very same rules in the Criminal Code in extenso; instead, it had incorporated them by reference. That cannot be delegation for the simple reason that the power of the legislature to make its own rules is derived from section 92 of the British North America Act and not from Parliament."

("The Interaction of Federal and Provincial Laws", supra, page 708; reproduced in Meherally, pages 528; and 262; emphasis added)

In Dick v. The Queen [1985] 2 S.C.R. 309, the Supreme Court upheld the validity of section 88 of the Indian Act, R.S.C. 1970, c. I-6, which incorporated by reference provincial legislation. As was pointed out in the written submissions of the AGNS, section 88 at issue in Dick, and section 157 in this case both provide that provincial laws "apply." Section 157 of the Implementation Act actually uses the word "apply." Section 88 of the Indian Act stated that certain provincial laws "are applicable."

These authorities support the conclusion that the incorporation by reference of Nova Scotia social legislation in section 157 is constitutionally valid. Anticipatory incorporation, or incorporation by reference of provincial legislation as amended from time to time, has been upheld in Coughlin, supra, and Dick, supra. The requirement that the incorporated legislation be independently valid, as suggested in Meherally, supra, is met in this case. Nova Scotia social legislation, such as the Trade Union Act, is independently valid under section 92 of the Constitution, Property and Civil Rights within the Province.

The delegation of authority to the Provincial Minister in section 157(5) requires closer analysis. Section 157 states that:

"157. (5) Subject to section 6, the Governor in Council may make regulations

(a) prescribing a work or a class of works for the purpose of the definition 'marine installation or structure' in subsection (1); and

(b) prescribing, for the purpose of subsection (2), any Act of the Legislature of the Province or excluding any such Act from the application of that subsection."

Section 6, as has already been indicated, states that:

"6. Before a regulation is made pursuant to subsection 5(1),... 157(5) or ..., the Federal Minister shall consult the Provincial Minister with respect to the proposed regulation and no regulation shall be so made without the approval of the Provincial Minister."

(emphasis added)

The Federal Minister is defined in section 2 as being the Minister of Energy, Mines and Resources. The Provincial Minister is defined therein as being the Minister of Mines and Energy of the province.

The power of approval was referred to by the majority of the Federal Court of Appeal in Meherally, supra. Urie, J., referred to the Ontario Court of Appeal decision in Regina v. Glibbery, [1963] 1 O.R. 232, as authority for extending the doctrine of incorporation of legislation by reference to a case where the adoption of provincial legislation occurred, not by statute, but by regulation. In Glibbery, supra, the legislation granted the Governor in Council the authority to make regulations, while in Meherally, supra, the Unemployment Insurance Commission was granted the authority to make regulations subject to the approval of the Governor in Council. Urie, J., with whom Hugesson, J., was in complete agreement, virtually equated the power to approve regulations with the power to make regulations:

"... Secondly, I fail to see how there can be a distinction between this case and Glibbery only because in the latter the Governor in Council was authorized to make regulations while in this case the Governor in Council was required simply to approve of regulations made by the Commission. ..."

(Meherally, supra, pages 531; and 264)

In Horton v. St. Thomas Elgin General Hospital et al. (1982), 39 O.R. (2d) 247, Smith, J., of the Ontario High Court of Justice, held that a by-law was ineffective because it did not receive Ministerial approval as required by the statute. In that case, an official in the Minister's Department issued a letter stating that the Minister had approved the by-law in question. The Court ruled that in order for the by-law to be valid there had to be evidence that the Minister permitted others to act on his behalf in the matter or that he had, as a strict minimum requirement, applied his mind to the question by laying down a pre-determined procedure within his department. The minimum may not be sufficient in some cases. The decision in Horton, supra, illustrates that, where a statute stipulates that Ministerial approval is required in order to pass delegated legislation, the absence of approval will render the delegated legislation invalid.

The Meherally and Horton cases suggest that the power delegated by Parliament to the Provincial Minister, the power of approval of regulations, is a legislative as opposed to a purely administrative power. This conclusion is further supported by reference to section 157(5)(b) which provides that the Governor in Council may, subject to the approval of the Provincial Minister as required by section 6, prescribe any act of the Legislature of the

province of Nova Scotia which will apply to marine installations or structures which are within the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area. The power to enact regulations, and the power to approve or withhold approval of regulations that will determine which statutes will apply, is clearly a legislative power.

This conclusion raises the question of whether the delegation to the Provincial Minister under section 157(5) constitutes an unconstitutional delegation of legislative authority from Parliament to a provincial legislature within the meaning of the Nova Scotia Inter-delegation case. Does delegation of legislative authority to a provincial cabinet minister constitute delegation to the legislature in which the minister sits?

In Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312, the Supreme Court of Canada examined the relationship between the executive and the legislature, in the province of Quebec, in the context of section 133 of the Constitution Act, 1867. Section 133 requires the publication, in both French and English, of all acts of the Legislature of Quebec and the Parliament of Canada. In Blaikie, *supra*, the Court ruled that regulations enacted by the Quebec government, pursuant to legislative powers delegated to it by the Quebec Legislature, must be viewed as an extension of the legislative power of the Legislature. Accordingly, the enactments of the government under such delegation must be considered the enactments of the Legislature for the purposes of section 133.

In reaching this conclusion the Supreme Court, in a

unanimous decision, provided the following discourse on the nature of the relationship between the executive and the legislature:

"The provincial executive power is vested in the Queen (Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick) represented by the Lieutenant-Governor (B.N.A. Act, s. 58) whose office is beyond the competence of the Legislature to modify (B.N.A., s. 92(1)).

The Lieutenant-Governor is part and parcel of the Legislature (B.N.A. Act, s. 71; Legislature Act, R.S.Q. 1977, c. L-1, s. 1). He appoints members of the Executive Council and ministers (B.N.A., s. 63; Executive Power Act, R.S.Q. 1977, c. E-18, ss. 3 to 5) and these, according to constitutional principles of a customary nature referred to in the preamble of the B.N.A. Act as well as in some statutory provisions (Executive Power Act, R.S.Q. 1977, c. E-18, ss. 3 to 5, 7, 11(1); Legislature Act, R.S.Q. 1977, c. L-1, s. 56(1)), must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch. There is thus a considerable degree of integration between the Legislature and the Government.

The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial legislative agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and in most cases decides whether or not the legislative power is to be delegated and, if so whether it is to hold it itself or to have it entrusted to some other body.

Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s. 133 of the B.N.A. Act."

(pages 319-320)

Sections 63 and 71, which form the basis for much of the Court's analysis, do not apply to the province of Nova Scotia whose existing constitution was incorporated into

the Constitution Act, 1867, section 88. The comments about the relationship between the executive and the legislature seem capable, however, of a general application. The Court's comments indicate that in one sense the executive is a part of the legislature. In another sense, however, it is also separate, having its own constitutional status.

In Ex parte Kleinys (1965), 49 D.L.R. (2d) 225, Ruttan, J., of the British Columbia Supreme Court, dealt with the constitutionality of then sections 523, 526 and 527 of the Criminal Code which gave the Lieutenant Governor powers of detention, supervision and release of insane persons. It was argued in that case that the Lieutenant Governor exceeded his powers under the Constitution Act, R.S.B.C. 1960, c. 71, which created the office of Lieutenant Governor as a corporation sole with powers limited to those granted by provincial statute. The trial judge, however, ruled that the Lieutenant Governor was acting:

"... as agent for the Federal Government in a field in which he has inherent power to decide when it is safe to allow a person found to be of unsound mind, to return to society."

(Kleinys, supra, page 228)

In Regina v. Wilson (1980), 119 D.L.R. (3d) 558, the British Columbia Court of Appeal stated that a Lieutenant Governor has status to receive delegated powers from Parliament. Its conclusion was based on the decision in Kleinys, supra, and by comparison to Willis, supra:

"... A Lieutenant-Governor has status to receive delegated powers from Parliament just as much as the marketing board in P.E.I. Potato Marketing Board v. Willis, supra, or any individual. ..."

(Wilson, supra, page 568)

In Re Peralta et al and The Queen in right of Ontario et

al. (1985), 49 O.R. (2d) 705 (C.A.), affirmed in Peralta v. Ontario, [1988] 2 S.C.R. 1045, the Ontario Court of Appeal upheld a federal regulation which authorized the Ontario Minister of Natural Resources to designate, in any commercial fishing licence, the waters and the species, size and quantity of fish for which the licence was valid. The Court ruled that the delegation by the Governor in Council to the Provincial Minister was constitutionally valid. The action of the Minister in setting individual quotas for commercial fishermen for particular waters was held to be administrative, as it involved the application of a general policy in relation to particular situations in the province. Because the power delegated was administrative, it did not fall within the constitutional prohibition of inter-delegation of legislative power. The Supreme Court of Canada, in affirming the decision of the Ontario Court of Appeal, expressed its substantial agreement with the reasons of that Court. It expressed its reservations on another point, but not on the finding that the delegation to the Provincial Minister was constitutional because it involved the delegation of an administrative power.

In R. v. Furtney, [1991] 3 S.C.R. 89, Stevenson, J., for a unanimous Supreme Court of Canada, confirmed the principle prohibiting inter-delegation of legislative authority:

"I agree with Dreidger in 'The Interaction of Federal and Provincial Laws' (1976), 54 Can. Bar Rev. 695, when he concludes that inter-delegation is constitutionally impermissible because there is a constitutional prohibition founded upon the granting of exclusive powers to the Parliament on one hand, and the provincial legislatures on the other."

(page 104)

In that case, the Court had to determine, inter alia, whether sections 207(1)(b), 207(2) and 207(3) of the Criminal Code are ultra vires Parliament as improper delegation to a provincial body of a matter within the exclusive competence of the federal government. Section 207(1)(b) gives authority to the Lieutenant Governor in Council of a province or a person or authority specified by him to issue licences to charitable or religious organizations to conduct and manage lottery schemes. Section 207(2) authorized the Lieutenant Governor in Council, or a person designated by him, of a province to set out in the licences issued pursuant to section 207(1)(b) terms and conditions relating to the operation of or participation in the lottery scheme. Section 207(3) provides that any person who, for the purposes of a lottery scheme, does anything not authorized by or pursuant to a provision of section 207 is guilty of an offence.

The appellants argued that Parliament, in sections 207(1)(b) and 207(2), exceeded its powers of delegation in permitting exemptions from criminality for charitable or religious organizations operating a lottery pursuant to a licence issued by the Lieutenant Governor in Council or a province. The Court rejected this argument and concluded that the sections in issue do not involve the delegation of any authority to a provincial legislature:

"The prohibition is against delegation to a legislature. There is no prohibition against delegating to any other body. ... The Lieutenant Governor in Council has capacity or status to receive a delegated power: R. v. Wilson (1980), 119 D.L.R. (3d) 558 (B.C.C.A.), at p. 568. He is not subject to any constitutional prohibition against the acceptance of delegated authority. It may be that in some instances a delegation to the Lieutenant Governor would be tantamount to a delegation to a legislature. That decision need not be resolved in this case because the essential elements of the substantial federal scheme are spelled out in the Code and what was

done by the Lieutenant Governor was to make administrative decisions relating to matters of essentially provincial concern. These decisions fall within the ambit of the decision in Re Peralta, supra."

(Furtney, supra, page 104)

These cases support the conclusion that the delegation of legislative authority to the Provincial Minister in section 157(5) is constitutionally valid. This conclusion is subject to the caveat expressed by Stevenson, J., writing for the Court in Furtney, supra, that it may be that in some instances a delegation to the Lieutenant Governor, and presumably therefore a ministerial member of the executive, would be tantamount to a delegation to the legislature. His Lordship did not, however, offer any hint as to the circumstances in which such an improper delegation would occur. It appears, however, that in the instant case the delegation seems to be a delegation of legislative authority whereas Furtney, supra, and Peralta, supra, involved delegations of administrative authority. It is possible that Stevenson, J., was thinking of delegation of legislative authority to a provincial executive, or member thereof, as constituting prohibited delegation to a provincial legislature. However, such a conclusion can only be purely speculative in the absence of any clear indications to that effect in the decision. On the basis of the authorities, as they have actually been decided, we conclude that the delegation of authority to the Provincial Minister in section 157 is constitutionally valid.

The parties are in agreement that the Gorilla is a marine installation or structure within the meaning of section 157. The parties disagree on the proper application of sections 157(2) and 157(4). The parties also disagree over whether, at the time of the application for certification, the Gorilla was in the offshore area for the purpose of becoming or was permanently attached to, permanently anchored to or permanently anchored on the seabed or subsoil or the submarine areas of the offshore area.

(A) Is the Board's jurisdiction determined by section 157(2), section 157(4) or both?

Rowan argued that a review of the historical development of the Implementation Act shows that the Nova Scotia accord was deliberately expanded to include the Trade Union Act. Sections 157(2) and 157(4) are complementary and overlap but do not conflict. Thus section 157(2) applies and cannot be whittled down by reliance on the maxim of statutory interpretation by which "the specific overrides the general." By virtue of section 157(2), Nova Scotia social legislation, including the Trade Union Act, applies and the Code is thereby excluded.

SIU points out that section 157(2) declares that Nova Scotia social legislation applies on any marine installation or structure, but does not declare that the Code does not apply. Section 157(4), on the other hand, in addition to stating that the Trade Union Act applies, also specifically states that the Code does not apply to the marine installations and structures referred to in section 157(4). Consequently, both the Code and the Nova Scotia social legislation apply in the cases covered by section

157(2). Thus an application for certification could be instituted before either the Canada or Nova Scotia boards. At the least, the Code applies to everything except the structures set out in section 157(4); marine structures permanently attached to, permanently anchored or permanently resting on the marine bed.

In order to assess these arguments it is necessary to examine in detail the wording and structure of section 157. It is clear that the various provisions of section 157 must be read together in order to determine the proper application of sections 157(2) and (4). Section 157(1), for example, is a definition section which indicates what constitutes a "marine installation or structure" for the purposes of section 157. It also defines "Nova Scotia social legislation" by listing four Nova Scotia statutes, including the Trade Union Act.

However, section 157(1) is not the only provision that determines what constitutes a "marine installation or structure" or what constitutes "Nova Scotia social legislation." Section 157(5)(a) provides the Governor in Council the authority, with the approval of the Provincial Minister, to make regulations prescribing a work or class of works for the purpose of definition of "marine installation or structure" in section 157(1). Section 157(5)(b) also provides the Governor in Council with the authority, with the approval of the Provincial Minister, to make regulations prescribing, for the purpose of section 157(2), which Nova Scotia statutes will apply. That authority includes the authority to exclude any such Act from the application of section 157(2).

Section 157(3) precludes the application of certain Nova

Scotia statutes concerning occupational health or safety to marine installations or structures referred to in section 157(2) while they are in the offshore area in connection with the purpose of exploration, drilling, production, conservation or processing of petroleum.

Section 157(4) itself contains a number of significant provisions. Section 157(4)(a) expressly states that Part III of the Code, dealing with employment standards, and Part IV (now Part II), dealing with occupational health and safety do not apply to any marine installation or structure referred to in section 157(2). It is section 157(4)(b), however, that is most pertinent to these proceedings.

Section 157(4)(b) refers to marine installations or structures within the meaning of section 157(2), but only those marine installations or structures that are in the offshore area for the purpose of becoming, or that are, permanently attached to, permanently anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area. Out of the class of marine installations and structures created by section 157(2) it creates a subclass in which are included the marine installations and structures which satisfy the "permanency" criteria of section 157(4)(b).

In respect of this subclass, section 157(4)(b) provides that Part V, now Part I of the Code, does not apply, and the Trade Union Act does apply during such time as the marine installation or structure is within the offshore area in connection with a purpose referred to in that provision.

The question raised by the parties was whether sections

157(2) and 157(4) are in conflict. In the Board's view, there is no conflict between these sections. Section 157(1), subject to modification by the Governor in Council pursuant to section 157(5)(a), defines what constitutes a marine installation or structure. It also defines what constitutes Nova Scotia social legislation. Section 157(2) creates a subclass of marine installations consisting of those that are in the offshore area in connection with the activities described therein. The Nova Scotia social statutes set out in section 157(1), plus or minus any statutes designated by the Governor in Council pursuant to section 157(5)(b), apply to the marine installations and structures in this subclass.

A further subclass of marine installations and structures is carved out of this subclass by the operation of section 157(4)(b). The latter provision creates a subclass consisting of marine installations and structures as set out in section 157(2) with the further qualification that they must satisfy the permanency requirement of section 157(4)(b). In respect of this class of marine installations and structures Part V, now Part I of the Code, does not apply. In its place the Nova Scotia Trade Union Act does apply. In respect of these marine installations or structures, the Governor in Council has no statutory authority to remove the application of the Trade Union Act.

At present, the Governor in Council has not, under section 157(5), removed the application of the Trade Union Act. Thus a marine installation or structure within the meaning of section 157(2) will be governed by that Act. A marine installation and structure which also meets the

"permanency" requirements of section 157(4)(b) would be governed by the Trade Union Act, and excluded from the application of the Code, by virtue of both sections 157(2) and 157(4)(b).

(B) Was the Gorilla within the offshore area for the purpose of becoming, or was it, permanently attached to, permanently anchored to or permanently resting on the seabed or subsoil of the submarine areas of the offshore area, on January 13, 1992?

Rowan argued that the Gorilla satisfied the permanency purpose required by section 157. It submitted several cases as authorities for the proposition that permanency, in law, does not mean "forever"; it means "as opposed to temporary". See City of Toronto v. Ontario & Quebec R. Co. (1892), 22 O.R. 344 (Ch.D.); Henriksen v. Grafton Hotel, Ltd., [1942] 1 All E.R. 678 (C.A.) at p. 684; Traders Finance Corporation v. Enerson, [1943] 1 D.L.R. 214; (Sask. D.C.) and Nelson v. Dahl (1879), 12 Ch.D. 568. At the hearing Rowan argued, and provided an "expert opinion" that "permanent" in section 157(4) means from start to finish of the project, for the commercial life of the field. This argument was based, inter alia, on the evidence of Fred Weir who is Chairman and Chief Executive Officer of the Canada-Nova Scotia Offshore Petroleum Board.

SIU contended that "permanent," as used in section 157(4), cannot be a reference to the "economic life" of the project. Section 157(4), which purports to exclude the application of the Code, should be restrictively interpreted. Rowan is present in the offshore only by virtue of a contract with a duration of only five years and which can be terminated upon notice. Furthermore, separate

licences provide for production in two distinct fields. Legally therefore there are two projects. Since the Gorilla was in the Cohasset field, at the date of application, with the intention of moving very shortly thereafter to the Panuke field, it was not at that time permanently attached and did not have the intention of becoming permanently attached. The Gorilla does not meet the permanency requirement of section 157(4).

The authorities cited by Rowan are certainly of some value in assigning a meaning to the word permanent as used in section 157(4)(b). They support the Rowan position that in law "permanent" means something other than "forever." It is also useful to look at the word in the context in which it is used in the statute in order to give its proper construction. In E.A. Dreidger, Construction of Statutes, Second Edition (Toronto: Butterworths, 1983), the author describes what he calls the "Modern Principle" of construction:

"Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This principle is expressed repeatedly by modern judges..."

(page 87)

The phrases "permanently attached", "permanently anchored" and "permanently resting" are best understood in this case by reference to other sections of the Implementation Act and the purpose for which it was enacted. The full title of the Act indicates that it is an Act to "implement an agreement between the Government of Canada and the Government of Nova Scotia on offshore petroleum management

and revenue sharing and to make related and consequential amendments." The definition of "Accord" in section 2 of the Act indicates that the agreement was entered into on August 26, 1986 between the Government of Nova Scotia and the Government of Canada.

The Act provides for the establishment of a "unified" administrative regime, in which the Federal Government and the Nova Scotia government participate in the development of petroleum resources in the "Nova Scotia" offshore area. The Act establishes a joint management regime and provides for the issuance of interests and licenses for the exploration, development and production of petroleum resources. It also provides for royalties, revenue-sharing arrangements and equalization payments. Environmental, development and drilling funds are established. Nova Scotia social legislation is made applicable, and Nova Scotia superior courts are provided with appellate authority in respect of decisions of the Board established in Part I to administer the regime.

All these provisions are related to the exploration, development and production of petroleum resources in the offshore. Thus in section 157(2) the marine installations and structures which are made subject to Nova Scotia social legislation are only those which are "in the offshore area in connection with the exploration or drilling for or the production, conservation or processing of petroleum within the offshore area." Other marine installations and structures are not made subject to the Nova Scotia social legislation. Likewise the specific applications of section 157(4)(b) apply only to a subclass of marine installations and structures within the meaning of section 157(2); they too must be in the offshore in connection with the

exploration or drilling for or the production, conservation or processing of petroleum within the offshore area for that provision to apply. The purpose and general scheme of the Act, as well as the definition of marine installation and structure all suggest that the phrases permanently anchored, permanently attached and permanently resting should be interpreted as relating to the exploration, development and production of petroleum. Permanency, as argued by Rowan, should be interpreted as permanency relative to the phases of the petroleum production process. Thus if there is evidence that a marine installation or structure is in the offshore with the intention of completing the production phase of a project it would satisfy the permanency requirement of section 157(4)(b).

In this case, there is evidence to support the conclusion that the Gorilla satisfies the permanency requirement. The development plan and the contract between LASMO and Rowan together indicate that the Gorilla will be involved in the production stages of both the Cohasset and the Panuke sites. This documentary evidence is supported by the refitting for production purposes, at substantial expense, of the Gorilla. The refitting occurred prior to the date of the application for certification.

SIU argued that the LASMO contract provided for the early termination of the contract and that, accordingly, it did not provide evidence of the intention of permanency required. However, it is normal for any contract with a specified term to contain clauses dealing with early termination of the contract. The inclusion of such clauses can hardly be said to indicate that no intention of permanency within the meaning of the Act exists.

SIU also argued that because two licences were issued, the projects have to be considered separately for the purpose of determining whether the intention of permanency has been demonstrated. Since Rowan will shortly be completing the Panuke project, and moving to Cohasset, it cannot be said that it is presently permanently attached, anchored or resting. There are two answers to this argument. One is that even if consideration is given only to the Panuke site, it is clear that the Gorilla is attached or resting there for the duration of the production stage. If that duration is only one more month or one year it is still permanent when assessed in relation to the production stage of that site.

The second answer to this argument is that section 157(4)(b) operates when the marine installation or structure is within the offshore area for the purpose of becoming permanently attached, anchored or resting. It thus applies as soon as the structure enters the offshore with that purpose. In this case the evidence indicates that Rowan intends to have the Gorilla at the Cohasset site for five and a half years, or the duration of the production phase of that site. That intention, which existed when the Gorilla entered the offshore area, is itself sufficient to satisfy the requirements of section 157(4)(b). It does not matter that the Gorilla will have moved to the Panuke site in the time between entering the offshore and coming to permanent rest at Cohasset. It still had the intention of permanency in respect of the Cohasset site at the time it entered the offshore area.

VI

Earlier, the Board noted that the issue of which level of

government enjoys legislative authority over the "Nova Scotia" offshore may not yet have been determined. Because of the terms of the original grant which created Nova Scotia it is possible that Nova Scotia, unlike British Columbia or Newfoundland, enjoys legislative authority over a substantial part of its offshore areas. The provisions of the provincial offshore legislation expressly state that Nova Scotia is not, by enacting that legislation, conceding the issue of jurisdiction to Parliament. This issue was not, however, before the Board during the course of the hearing, was not argued by the parties, and no notice was given under the Federal Court Act to interested parties. The Board will therefore operate on the assumption that Parliament has legislative authority over the Nova Scotia offshore. Of course, on either basis, the net result here is the same.

Section 157 is not, on the basis of the decided cases, an unconstitutional delegation of legislative authority. Those parts of section 157 which provide for the application of Nova Scotia social legislation are examples of constitutionally valid, anticipatory incorporation by reference of provincial legislation.

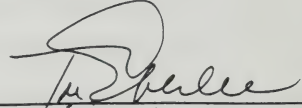
Section 157(5), which provides the Provincial Minister with legislative authority, insofar as his approval is required before the Governor in Council may make regulations, adding to or removing from the list of applicable Nova Scotia statutes is less certain. On the basis of the authorities as decided to date section 157(5) is constitutionally valid. This is subject, however, to the caveat expressed in the statements of Stevenson, J., for the Supreme Court of Canada, in Furtney, supra, to the effect that, in some cases, delegation to the Lieutenant Governor, and by

extension the Minister, could constitute delegation to a legislature as prohibited by the Nova Scotia Inter-delegation case. However, in the absence of any clear indications in the comments of Stevenson, J., as to what circumstances might constitute delegation to a legislature it is preferable to follow the decided authorities and conclude that section 157(5), and section 157 in its entirety, is constitutionally valid.

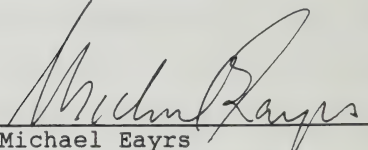
Both sections 157(2) and 157(4)(b) operate to provide for the application of the Nova Scotia Trade Union Act, and the exclusion of the application of the Code, to marine installations and structures that satisfy the permanency requirements of section 157(4)(b). It is possible that the Governor in Council, with the approval of the Provincial Minister, may in the future remove the application of the Trade Union Act to structures within the meaning of section 157(2) generally. In that case, however, section 157(4)(b) would continue to operate to exclude the application of Part I of the Code and include the application of the Trade Union Act.

The permanency requirement of section 157(4)(b) does not require an intent to remain in the offshore "forever." Such a conclusion would ignore the purpose and scheme of the Act, which essentially is to allow the two levels of government to participate in the administration and development of petroleum resources in the Nova Scotia offshore. An installation or structure which is in the offshore with the intention of remaining there for the duration of the production or exploitation of petroleum resources at one or more sites should satisfy the permanency requirement.

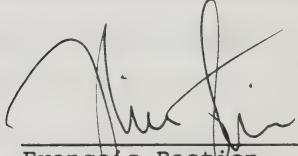
The Board has no jurisdiction to deal with the application.



Thomas M. Eberlee
Vice-Chairman



Michael Eayrs
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 1st day of October 1992.

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SUMMARY

Canada Post Corporation, applicant, and Bermiline Jolly, respondent.

Board File: 530-2106
Decision no.: 962

Application for reconsideration pursuant to section 18 of the Canada Labour Code (Part I - Labour Relations).

In Bermiline Jolly (1992), as yet unreported CLRB decision no. 929, a reconsideration panel of the Board referred to the original panel a matter which had been dealt with in Bermiline Jolly (1991), as yet unreported CLRB decision no. 909. The matter involved a complaint by an employee that she had been disciplined for exercising her right to refuse unsafe work, in contravention of section 147(a) of the Code. The reconsideration panel directed the original panel to determine the factual question of whether the complainant had "reasonable cause" to believe that a danger existed. In Bermiline Jolly (1992), as yet unreported CLRB decision no. 941, the original panel concluded that the complainant had reasonable cause to believe there was danger and was entitled to the protection of the Code.

The decision of the original panel in Bermiline Jolly (941) was also the subject of an application for reconsideration. The reconsideration panel found that the original panel had made a decision on the facts and dismissed the application for reconsideration.

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RÉSUMÉ

Société canadienne des postes, requérante, et Bermiline Jolly, intimée.

Dossier du Conseil: 530-2106
Décision n°: 962

Demande de réexamen fondée sur l'article 18 du Code canadien du travail (Partie I - Relations du travail).

Dans Bermiline Jolly (1992), décision du CCRT n° 929, non encore rapportée, un banc de révision du Conseil a renvoyé au banc initial une question qui avait fait l'objet de la décision rendue dans Bermiline Jolly (1991), décision du CCRT n° 909, non encore rapportée. Il s'agissait d'une plainte dans laquelle une employée alléguait qu'on lui avait imposé des mesures disciplinaires parce qu'elle avait exercé son droit de refuser de faire du travail dangereux, en violation de l'alinéa 147a) du Code. Le banc de révision a ordonné au banc initial de décider de la question de faits suivante: la plaignante avait-elle des «motifs raisonnables» de croire qu'il y avait danger? Dans Bermiline Jolly (1992), décision du CCRT n° 941, non encore rapportée, le banc initial a conclu que la plaignante avait des motifs raisonnables de croire qu'il y avait danger et avait droit à la protection du Code.

Le décision du banc initial dans Bermiline Jolly (941) a également fait l'objet d'une demande de réexamen. Le banc de révision a jugé que le banc initial avait rendu une décision fondée sur les faits et a rejeté la demande de réexamen.

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REASONS FOR DECISION

Canada Post Corporation,
applicant,

and

Bermiline Jolly,
respondent.

Board File: 530-2106

The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Louise Doyon and Mr. J. Philippe Morneau, Vice-Chairs.

Appearances (on record)

Mr. Ian Szlazak, for the applicant; and
Mr. David I. Bloom, for the respondent.

This is an application pursuant to Section 18 of the Canada Labour Code, for reconsideration of the decision Bermiline Jolly, (1992), as yet unreported CLRB decision no. 941. That was a case in which a reconsideration panel had, in Bermiline Jolly, (1992), as yet unreported CLRB decision no. 929, referred back to the original panel a matter which had originally been dealt with in Bermiline Jolly, (1992), as yet unreported CLRB decision no. 909. In that case the original panel, which consisted of Board Member Calvin B. Davis, had concluded that the employer, Canada Post Corporation, had disciplined the complainant, Bermiline Jolly, in contravention of section 147(a) of the Code because she had acted in accordance with section 128. Board Member Davis found that the complainant's refusal to unload a monotainer containing foreign parcels, after developing

an itch in her hands while performing her work, was based on "genuine safety concerns".

Section 147(a) of the Code prohibits employers from taking disciplinary action against employees where an employee has acted in accordance with the right to refuse unsafe work. That right arises under section 128 of the Code, section 128(1) providing as follows:

"Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

The reconsideration panel, in Bermiline Jolly, supra, CLRB decision no. 929, p. 3-4 stated:

"section 128, does not confer a right to refuse based merely on "genuine belief". The refusal, to have the protection of the Code, must be made in circumstances where there is "reasonable cause" for such belief."

The reconsideration panel then stated:

"In the instant case, while it is clear that the original panel found that Ms. Jolly's belief was a genuine one, it is impossible to determine whether the reasonableness of that belief was addressed. That is a factual question, and in accordance with the Board's practice in such cases, the matter is returned

to the original panel for determination of that issue."

The matter was accordingly referred back to the original panel, which subsequently issued its decision in Bermiline Jolly, supra, CLRB decision no. 941. The concluding paragraphs of that decision are as follows:

"In the particular circumstances of this case that has been referred back to the original panel for reconsideration, there is no need to deal further with Bermiline Jolly's refusal. The benefit of the doubt went to Ms. Jolly because of the sincerity of the concerns about her safety. Also taken into account was the fact that CPC did not fulfil its obligation under the Code to investigate her concerns. CPC simply disciplined her.

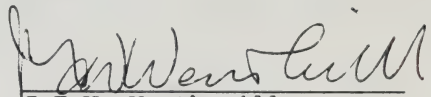
Her refusal was based on genuine safety concerns, which to this panel means that she did have reasonable cause to believe there was danger. No matter how minor or frivolous that danger may seem to the employer, she still is entitled to the protection of the Code.

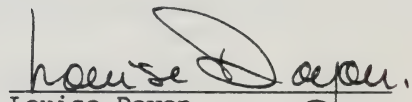
There being nothing new raised by Canada Post in their application for reconsideration that was not before the Board when it arrived at the original decision, the application is dismissed."

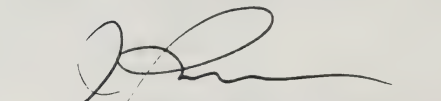
That decision (No. 941) is now the subject of the present application for reconsideration.

The right to refuse to perform work that is believed to be dangerous arises, as we have said, where there is reasonable cause for such belief. Although the original panel has not used the wording of section 128(1), which refers to "reasonable cause to believe", to articulate the test to be applied in this case, it does nevertheless appear clearly enough from an examination of the decision of the original panel that Board Member Davis was of the

view that it was, in the circumstances, reasonable for the complainant to believe that the handling of certain particular foreign mail constituted a danger to her. We do not comment on the reasonableness of that view. We consider, rather, that it does constitute a decision on the facts and that no purpose would be served in referring the matter back to the original panel again. Neither is it necessary that the question of statutory interpretation be referred to a plenary session of the Board, the test set out in the Code being clear. Accordingly, the application for reconsideration is dismissed.


J.F.W. Weatherill
Chairman


Louise Doyon
Vice-Chair


J. Philippe Morneault
Vice-Chair

DATED at Ottawa, this 6th day of October 1992.

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Summary

VIA Rail Canada Inc., applicant, International Association of Machinists and Aerospace Workers, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada), The International Brotherhood of Electrical Workers, respondent unions, and Brotherhood of Maintenance of Way Employees and James W. Young, interveners.

Board File: 530-1609

Decision No.: 963

This decision involves a bargaining unit review application filed by the employer, pursuant to section 18 of the Code, in respect of its shopcraft employees.

Résumé

VIA Rail Canada Inc., requérante, Association internationale des machinistes et des travailleurs de l'aérospatiale, Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie des États-Unis et du Canada, Syndicat national des travailleurs et travailleuses de l'automobile, de l'aérospatiale et de l'outillage agricole du Canada, Fraternité internationale des ouvriers en électricité, syndicats intimés, ainsi que Fraternité des préposés à l'entretien des voies et James W. Young, intervenants.

Dossier du Conseil:
530-1609

Décision n° 963

La décision qui suit porte sur une demande présentée par l'employeur en vertu de l'article 18 du Code, en vue de faire réviser l'unité de négociation composée de ses employés de métiers d'atelier.

The shopcraft employees perform repairs, maintenance and servicing on the employer's passenger cars and locomotives. The Board found that the existing bargaining structure, with employees organized along craft lines in various bargaining units, was no longer appropriate.

The Board ascertained that there is a large community of interest among all the craft employees affected by this application.

The Board found that the existence and application of craft rules led to many work jurisdiction disputes, restricting the flexibility of the employer to assign work.

The Board also found that the long-term job security of the craft employees would be enhanced by one comprehensive craft bargaining unit which would also ensure more rational collective bargaining.

The Board determined as appropriate for collective bargaining one single bargaining unit including all the employees at the employ of VIA Rail Canada Inc. assigned to the inspection, maintenance and servicing of rolling stock.

The Board ordered a representation vote to ascertain the wishes of the craft employees between the present craft unions representing these employees.

Ces employés effectuent des travaux de réparation, d'entretien et de révision sur les voitures et les locomotives de la compagnie. Le Conseil a conclu que la structure de négociation existante, soit plusieurs unités en fonction des métiers, n'était plus appropriée.

Le Conseil est convaincu que les employés de métiers d'atelier visés par la présente demande avaient une très grande communauté d'intérêt.

Le Conseil a jugé que l'existence et l'application de règles des métiers créaient de nombreux conflits juridictionnels, limitant ainsi la flexibilité de l'employeur à répartir le travail.

De plus, le Conseil a jugé que la sécurité d'emploi à long terme des employés de métier d'atelier serait accrue par l'existence d'une seule unité comprenant tous les métiers, ce qui assurerait au surplus des négociations collectives plus rationnelles.

Le Conseil a décidé qu'une seule unité de négociation, comprenant tous les employés de VIA Rail Inc. affectés à l'inspection, à l'entretien et à la révision du matériel roulant, est habile à négocier collectivement.

Le Conseil a ordonné la tenue d'un scrutin de représentation afin de s'assurer des désirs et de la préférence des employés de métier d'atelier, à l'égard des syndicats qui les représentent dans le moment.

Reasons for decision

VIA Rail Canada Inc.

applicant,

and

The International Association
of Machinists and Aerospace
Workers,

The United Association of
Journeyman and Apprentices of
the Plumbing and Pipefitting
Industry of the United States
and Canada,

The International Brotherhood
of Electrical Workers,

The National Automobile,
Aerospace and Agricultural
Implement Workers Union of
Canada (CAW-Canada),

The Canadian Brotherhood of
Railway, Transport and
General Workers,

respondent unions,

and

Brotherhood of Maintenance of
Way Employees, and

Mr. James W. Young,

intervenors.

Board File: 530-1609

The Board was composed of Mr. Marc Lapointe, Q.C., Chairman
of the panel, Mrs. Evelyn Bourassa and Mr. J. Jacques
Alary, Members.

Appearances

Mrs. Suzanne Thibaudeau and Mr. Guy Dufort, for the
applicant;

Mr. Steven H. Waller and Mr. Denis Power, for the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), respondent union;

Mr. T. N. Stol and Mr. Michael Lynk, for the Canadian Brotherhood of Railway, Transport and General Workers, respondent union;

Mr. James L. Shields, for the International Association of Machinists, for the International Brotherhood of Electrical Workers and for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, respondent unions;

Mr. David A. McKee, for the Brotherhood of Maintenance of Way Employees, intervenor; and

Mr. James W. Young, intervenor.

These reasons for decision were written by Mr. Marc Lapointe.

I

This decision disposes of an application filed by VIA Rail Canada Inc. pursuant to section 18 of the Canada Labour Code for a review of the general bargaining structure involving various groups of employees in the employ of VIA Rail Canada Inc. across Canada. The application was filed on April 12, 1988. To quote from an excerpt of the application itself:

"The applicant requests the Canada Labour Relations Board to review the current certification orders certifying various bargaining agents to represent, in different bargaining units, employees of VIA who are inspecting, servicing and maintaining, at its various maintenance locations, the passenger rolling-stock and to rationalize the existing bargaining structure in accordance with the allegations contained herein."

As is usual in all types of applications before the Canada Labour Relations Board, an officer of the Board was assigned the task of investigating this application and he filed his report with the parties and the Board on June 29, 1988. In the report, at item #5, the senior labour relations officer of the Board summarized the respective positions of all the interested parties in respect of the application by VIA Rail Canada Inc. Each and every one of the certified bargaining agents at the time of the application under consideration objected vigorously to the granting of the application which would have the effect of merging a number of bargaining units into a single unit regrouping all craft employees. There was however one bargaining agent certified at VIA Rail, that is, the Canadian Brotherhood of Railway, Transport and General Workers (the CBRT & GW), which not only supported the amalgamating consequences of the application of VIA Rail Canada Inc. but went one step further by asking, in the conclusion of its reply, that said craftsmen be merged with one of its two certified bargaining units at VIA Rail. There was also the Brotherhood of Maintenance of Way Employees which took the position that it was not a respondent but that it should be granted intervenor status to make sure that this status of not being affected by the application of VIA Rail would be recognized by the Canada Labour Relations Board.

The labour relations officer attached to his report the replies and a number of exhibits filed by the International Association of Machinists, the International Brotherhood of Electrical Workers, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Canadian Brotherhood of Railway, Transport and General Workers and of the National

Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada).

Most of the parties requested that the Board hold public hearings in this matter.

On January 26, 1989 the senior labour relations officer filed two additional documents to his report, that is attachments II and III containing further facts.

After having studied the results of the investigation up to that date, the panel of the Board decided that the case warranted public hearings. Hearings were scheduled and held in Montréal on February 8 and 9, 1989. During the course of these two days of public hearings, one chief witness was examined by counsel for VIA Rail and cross-examined by counsel for all of the interested parties. A second witness, another key witness, the Director of labour relations, Mr. David Andrew, was examined by counsel for VIA but was not cross-examined for lack of time and the Board had to arrange for further dates for public hearings.

At that stage, a series of events intervened which made the processing of this case aleatory: the last witness in question passed away. Illness forced a change of counsel for VIA Rail. When the Canada Labour Relations Board tried to arrange for new hearing dates, there was, towards the end of 1989 and the beginning of 1990, public announcements by Parliament concerning drastic changes in the structure and the mandate of VIA Rail. Some of the consequences included a curtailment of services and a reduction in the work force, accompanied by cuts in the funding afforded by Parliament to finance the operations of VIA Rail Canada Inc.

These announcements produced a chorus of requests for a postponement of Board hearings by most of the parties involved. The Board eventually granted the postponements. Hearings resumed on March 5, 6, 7, 8 and 9, 1990, in Montréal and were completed in Ottawa on March 13 and 14, 1990.

Some 80 exhibits were filed during the course of these hearings. Eight witnesses testified and the parties argued their respective positions on March 14 and most produced briefs and case books for the Board to consider prior to making its decision.

A long illness affecting the chairman of the panel seriously delayed the final disposition of this case.

II

The following short history of VIA Rail Canada Inc. and of the acquisition of bargaining rights by the various unions will provide for a better understanding of this case.

Passenger services in the Canadian rail industry used to be assumed mostly by Canadian National Railway Company and Canadian Pacific Railway Company.

On January 12, 1977, a new enterprise was incorporated by Parliament and it became a Crown corporation named VIA Rail Canada Inc. Shortly after, Parliament deemed VIA to be a railway company within the meaning of the Railway Act and funds were provided for it to begin its operations according to the Appropriation Act #1, S.C. 1976-1977, chapter 7.

The mission or mandate of VIA, according to the provisions of the various pieces of legislation which created it, was to provide a unified management and control of rail passenger services in Canada in such a manner as to improve efficiency, effectiveness and economy of these services.

On September 29, 1978, according to plan, VIA took over from CN and CP, the customer-related passenger railway services across Canada. On the same date, approximately 2800 unionized employees working in customer-related activities for these two companies were transferred to VIA (marketing, sales, advertising, tariffing, reservation and information).

A very large majority of these unionized employees who were transferred to VIA were represented at CN and CP by the Canadian Brotherhood of Railway, Transport and General Workers. It is not in dispute that the transfer on September 29, 1978, of these unionized employees was preceded on July 7, 1978, by the signing of a "special agreement" by CN Railway, CP Railway and VIA Rail Canada Inc. on the one hand and, on the other, the trade unions including the CBRT & GW representing the employees affected by the transfer of the customer-related passenger services from CN and CP to VIA. This agreement provided rules to be applied in the transfer of CN and CP employees to VIA.

This "special agreement" was in turn preceded by the signing by VIA and the CBRT & GW, on July 5, 1978, of a "Recognition Agreement" whereby the corporation voluntarily recognized the CBRT & GW as the bargaining agent for those employees of CN or CP transferred to VIA and it specified that VIA recognized that CBRT & GW "represented the vast

majority of those employees who will be affected by the commencement of its operations and who will be employed in such operations."

Under the provisions of the Canada Labour Code, the "voluntary recognition" by an employer of a trade union as the bargaining agent of a group of employees is legal and vests the "recognized union" with bargaining rights tantamount to certification.

It is important to note that the Canada Labour Relations Board was not brought into the picture at that time. It appears that on the basis of this voluntary recognition, CBRT & GW and VIA eventually entered into a collective agreement governing the working conditions of its "on-train" employees. It was labelled Wage Agreement no. 2.

It would also appear that in virtue of the terms of this "Recognition Agreement", that recognition was also granted by VIA to the CBRT & GW to represent another group of its employees which became part of a second bargaining unit and regrouped employees identified as "off-train" employees. A second collective agreement was entered into with this other unit. It became known as Wage Agreement no. 1. Interestingly, this second unit joined both "white-collar" and "blue-collar" employees.

A few months later, two applications were finally filed with the Board (our files 585-19 and 612-3). The first application alleged a sale of business between VIA Rail and CN and CP affecting the United Transportation Union, the Brotherhood of Sleeping Car Porters (dining and sleeping car employees) and the Canadian Brotherhood of Railway, Transport and General Workers.

In a short and cryptic letter decision dated December 15, 1978, the Board found that the transfer of business from CNR and CPR to VIA Rail Canada Inc. constituted a sale of business under the terms of the then section 144 (now section 44) of the Code, which thereby caused an intermingling of former CN and CP Rail "on-train" employees to occur. The Board then determined that the employees affected constituted an appropriate bargaining unit which was the unit recognized on July 5, 1978, by VIA and eventually covered by Collective Agreement no. 2 between the CBRT & GW and VIA and which encompassed "on-train" employees. Said agreement, signed July 21, 1978, was to take effect October 29, 1978. The Board also concluded that it was not necessary to hold a vote because of the overwhelming majority membership enjoyed by the CBRT & GW which the Board declared to be the bargaining agent of said unit.

The second application (our file 612-3) which was dealt with by the Board in the same decision was a joint application by the CBRT & GW and by VIA Rail to terminate their current collective agreement covering this unit. The Board granted that request to be effective December 31, 1978.

These procedures took care of the transfer of employees from CN or CP to VIA Rail in customer-related passenger services.

However, outside of the passenger-related services at VIA Rail, there were obviously other services required to run a passenger railway line. Some of these services made it necessary on September 28, 1978 for VIA to enter into almost identical and simultaneous "operation agreements"

with CN and CP. The agreements both contained an article 2 which had a paragraph entitled in one case "services provided by CN" and in the other "services provided by CP." Therein, reference was made to either CN or CP continuing to provide the following services to VIA:

- 1- the provision of train crews;
- 2- the switching of the rolling stock;
- 3- the servicing of the rolling stock;
- 4- the providing of communication systems for operating purposes;
- 5- the maintenance of railway lines, rights of way and roadbeds.

Turning to the rolling stock (locomotives and cars), from September 1978 to the end of 1980, the inspection, maintenance and servicing of that rolling stock was provided to VIA mostly with CN labour, material, equipment and facilities but also with some from CP. After September 1980 and until 1985, these services were provided almost exclusively by CN.

Towards the end of 1984, the government decided that VIA was to assume full and exclusive responsibility for the ongoing maintenance of its passenger rolling stock.

Here again, the parties involved, that is VIA Rail, CN and CP, proceeded in approximately the same manner as it did for the transfer of the passenger-related services and groups of employees from CP and CN to VIA. On May 14, 1985, a "special agreement" was signed by the two corporations, that is, between CN and VIA and various unions which, at the time, represented the shopcraft employees whose services were required in the maintenance of rolling stock. These unions were the railway carmen, the machinists, the electrical workers and a council of railway shopcraft unions regrouping other craft

employees which represented and had bargaining rights to represent the pipefitters, the boilermakers and the sheet metal workers. This "special agreement" (Exhibit #5) contained the conditions and benefits applicable to the transferred employees.

On May 29, 1985 the two corporations, VIA and CN, entered into another "special agreement" with the CBRT & GW to provide the conditions and benefits applicable to employees who worked in the CN maintenance facilities and were then represented by the CBRT & GW in Collective Agreement no 1.

Probably basing itself upon the decision of the Canada Labour Relations Board of December 15, 1978, referred to above at page 8 of these reasons for decision, VIA had entered into a series of voluntary recognition agreements with the Canadian Council of Railway Shopcraft Unions (then representing the pipefitters, the boilermakers and the sheet metal workers) and with the Carmen Union, the International Association of Machinists and the Electrical Workers, the whole triggered by the application of the provisions of section 144 (now section 44) of the Code having to do with the sale of business having occurred between CN and VIA Rail.

The Council of Railway Shopcraft Unions ran into serious problems during that period. This explains why between July and November 1985, six separate applications for certification were filed by the Brotherhood of Electrical Workers, the International Association of Machinists, the boilermakers, the sheet metal workers, the carmen and the pipefitters respectively involving VIA and they were, each one of them, granted by the Canada Labour Relations Board.

On February 25, 1987, the International Association of Machinists successfully raided the International Brotherhood of Boilermakers and was substituted as bargaining agent vis-à-vis that group of employees at VIA. The International Association of Machinists did the same thing in respect of the sheet metal workers and on the same date, the Canada Labour Relations Board substituted the machinists to the sheet metal workers as bargaining agent for those employees at VIA.

The evidence also shows that at the outset of the transfer of the servicing of rolling stock services from CN to VIA such servicing was done in a new modern maintenance centre in Toronto, built and owned outright by VIA. Some servicing was also done at old facilities rented from CN in Montréal. In the meantime, a new modern maintenance centre was being built by VIA in Montréal and in 1987, all the Montréal employees working in the servicing and maintenance of passenger rolling stock were moved from the leased premises to that modern centre.

Finally, since 1985, there were some transfer of maintenance work and employees finalized in 13 other locations across Canada, although on a much smaller scale.

As a result of these various transactions, VIA Rail employees working in the servicing and maintenance facilities for rolling stock were at the time of the application under consideration represented by the five following unions:

- 1) The Brotherhood of Electrical Workers, a unit comprising approximately 280 employees;

- 2) The plumbers and pipefitters union, a bargaining unit comprising approximately 140 employees;
- 3) The Carmen Union, now the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), the largest unit, comprising approximately 735 employees;
- 4) The CBRT & GW representing in one of its two bargaining units, a group of approximately 280 so called "blue-collar employees" (in the "off-train" unit) (Wage Agreement no. 1);
- 5) Finally, the International Association of Machinists representing approximately 180 machinists and also, approximately 20 boilermakers and 17 sheet metal workers.

III

In its application for review of the collective bargaining structure at VIA, the applicant, VIA Rail Canada Inc., alleges that it has become evident *"that the bargaining unit structure inherited from CN, is inappropriate to VIA's maintenance operations, and is a source of labour relations problems as well as of serious inefficiencies"* (emphasis added). Furthermore, the applicant claims that in order to restore and favour industrial peace and efficient operation, a rationalization of the bargaining structure in the maintenance area is required.

The applicant lists 10 areas where the maintenance operations at VIA differ essentially from the same operations at CN.

- "1) CN employed thousands of employees to perform an enormous volume of maintenance directed, in majority, to the maintenance of freight rolling stock, and which involved not only maintenance and servicing at "line points" but also an important volume of heavy repair or rebuilding work in its "back shops";
- 2) At CN, maintenance work was performed separately on cars and locomotives in both the "line points" and the "back shops" and, additionally, maintenance work in "back shops" was organized on a production line basis;
- 3) This, on its own, encouraged the division of the work force into groups of different trades (eg. a group of machinists, a group of electricians, ...), for the execution of the maintenance work, each group usually falling under the direction of a Foreman;
- 4) In contrast, VIA services and maintains exclusively passenger rolling stock;
- 5) At the level of servicing, inspection and maintenance, passenger rolling stock needs to be turned-over speedily, the trains being required to be rapidly put back into service;
- 6) VIA's maintenance facilities were therefore built and equipped to allow the trains to be serviced "in consist" or as a unit, the locomotive and cars entering the facility without being separated one from the other;
- 7) Moreover, the volume of work involved in VIA's maintenance operations is considerably smaller when compared to CN's overall maintenance operations;
- 8) The same holds true even if the comparison were limited to the size of VIA's maintenance operations with that of CN's passenger maintenance operations prior to the transfer of June 1985;
- 9) The effect of the smaller volume of work in VIA's maintenance operations has been, more notably, to reduce the volume of specialists' work;
- 10) In addition, the smaller volume, and other differences cited previously, has meant that the employees involved in VIA's maintenance operations normally work in composite teams, whatever be their trade union affiliation, under the direction of a single Supervisor."

Furthermore, the applicant alleges that employees currently represented by these different trade unions very often perform work of a similar or identical nature even though they are divided into different bargaining units.

VIA argues that the type and volume of work required for the servicing of the rolling stock in its operations requires a lesser number of specialists leading to a major difference between the CN equivalent services in that the employees at VIA work in composite teams instead of working in separate groups of tradesmen thus rendering the existing bargaining unit structure inappropriate and inefficient.

It also alleges that the existing bargaining structure is a source of numerous jurisdictional disputes between vying trade unions who attempt to preserve or expand the scope of their respective jurisdictions, and therefore, bargaining units, causing labour relations unrest.

The applicant alleges that the shopcraft unions involved have transplanted into VIA's operations "shopcraft rules" existing at CN or CP which do not reflect the requirements of VIA Rail and the realities of today's work in that area.

Finally, VIA Rail argues that the manner in which it has had to organize its maintenance operations and to structure the work-force to meet its particular requirements, the obvious blurring of jurisdictional lines and the numerous similarities in the work performed by all the employees currently divided into seven bargaining units leads it to believe and conclude that the existing bargaining structure is not appropriate and that the seven bargaining units should be replaced by a single unit since there is a similarity of working conditions applicable to all these employees. The elimination of artificial boundaries between these various bargaining units is a pressing necessity in order to ensure and favour industrial peace and sound labour relations as well as the efficient organization of the work.

The applicant proposes one single bargaining unit described as follows: *"all the employees of VIA Rail Canada Inc. involved in the inspection, maintenance and servicing of rolling stock."*

In his concluding argument, counsel for the applicant admits that should the Board grant its application this would lead to the elimination of five craft union bargaining units and to the carving out of the CBRT & GW off-train unit of all of those employees involved in the maintenance and servicing of the trains, including all those employees represented by CBRT & GW classified as cleaners whose work involves the cleaning of locomotives and, occasionally, of passenger coaches.

IV

It is only at the very last moment of the public hearings that it became clear that the Brotherhood of Maintenance of Way Employees was not affected by the application under consideration. This resulted from a statement made by counsel for the CBRT & GW in his opening remarks in argument that it did not seek to encompass in its bargaining rights employees represented by the BMW working at facilities of VIA Rail.

The BMW was thereupon declared not to be a party to these proceedings and the Board shall ensure that the jurisdiction and rights of that Union are preserved accordingly.

At least two other major bargaining agents whose members provide services at VIA Rail were never parties to this application, namely, the Brotherhood of Locomotive

Engineers and the United Transportation Union (representing conductors, brakemen and yardmen).

In summary then, the application of VIA Rail affects the International Association of Machinists, covering three bargaining units:

- 1) a unit of machinists;
- 2) a unit of boilermakers; and
- 3) a unit of sheetmetal workers.

It also affects the Brotherhood of Railway Carmen of Canada (which has since become the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Board file 580-114, November 13, 1990), the International Brotherhood of Electrical Workers, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the pipefitters) and finally, the Canadian Brotherhood of Railway, Transport and General Workers as regards part of its bargaining unit of "off-train" employees.

VIA Rail asks the Board to substitute one single bargaining unit for the three represented by the IAM, the one represented by the CAW-Canada, the one represented by the IBEW, and the one represented by the pipefitters and to carve out and add to the proposed single bargaining unit, employees in the "off-train" bargaining unit represented by the CBRT & GW who provide the servicing and maintenance of the rolling stock of VIA Rail.

We stated at the outset of these reasons for decision that all of the affected bargaining agents, except one, opposed the application of VIA Rail. The one exception was the

CBRT & GW. CBRT & GW supported the reasoning of VIA Rail to justify a restructuring of its bargaining structures but it went one step further. It asked the Board not to create a single bargaining unit of shopcraft employees, but instead to sweep all of these shopcraft employees into the already existing unit of "off-train" employees for which it is already certified by the Board, and which comprises white-collar and blue-collar employees, some of the latter holding positions assigned to work on the maintenance or servicing of the rolling stock of VIA Rail. All the other bargaining agents opposed this request of the CBRT & GW.

A further development occurred. One day prior to the resumption of the last two days of public hearings in this case, the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) changed its position and stated in writing that it now agreed with the conclusions of VIA Rail and supported the creation of one single bargaining unit of all shopcraft employees at VIA Rail.

We quote from that letter (exhibit 76):

"The Carmen have until now supported the status quo at VIA, i.e., a separate bargaining unit for each shopcraft...It has become apparent, however, that the maintenance of six different units for shopcraft employees at VIA no longer serves the best interests of those employees... The proposed shopcraft bargaining unit is supported by the following factors:

- 1) *with the recent cutbacks at VIA, just over 1,000 working shopcraft employees are spread over six bargaining units, two of which have less than 25 working employees see exhibit 52 (f);*
- 2) *all indications are that VIA will continue to operate with reduced resources, leading to pressures on the bargaining agents. Shopcraft employees would be better protected in bargaining by a single bargaining agent representing a greater number of employees;*

- 3) *a single bargaining agent would be better placed to preserve and protect shopcraft work for shopcraft employees as a whole. This objective can be compromised by rivalry among several bargaining agents intent on maintaining their share of the remaining work..."*

That letter went on to say that it did not support the position of the CBRT & GW leading to the inclusion of all shopcraft employees in the same unit as the one represented by CBRT & GW and regrouping blue and white-collar "off-train" employees . However, during the final arguments, the position of the Carmen in this last regard was slightly changed again. Regarding the blue-collar employees assigned work in the maintenance of rolling stock, members of the "off-train" unit of the CBRT & GW, counsel had this to say:

"And I'll now turn to the blue-collar workers who are considered by VIA to be part of the maintenance operations. To some extent, the employer's organization does suggest that these blue-collar workers ought to be included with the shopcraft employees... It is, however, a serious matter, we think, when the Board is asked to carve these people out of an existing unit. ...Essentially, there is a case to be made that they should be included with the shopcraft employees but there is also a case to be made that they have a different community of interest... So, in summary, for the blue-collar CBRT workers, yes there is some case to be made that some of them are involved in maintenance and they should be added. But there is the countervailing concern that to carve them out will deprive them of some negotiated benefits and it will, I guess be up to the Board to decide where appropriateness lies with those two concerns."
(Transcript, March 14, 1990 -pp. 71 and 73).

Needless to say, this change of position by the Carmen, was bitterly decried by the other bargaining agents still opposed to VIA Rail's application.

The application under consideration raises the question of the continued appropriateness of separate certifications on the basis of craft lines at VIA. As was amply canvassed by this Board in Canadian National Railway Company et al (1986), 64 di 70 (CLRB no. 556), craft unions "...became deeply entrenched in the railway industry very early and, despite the 1973 amendment to the Canada Labour Code, which deemphasized the traditionally acquired rights of craft unions to be certified separately..." Some 20 years later craft unions' separate bargaining rights still persist in the railroad industry and at VIA. This situation exists despite the fact that more advanced technology and new work methods and tools have led to undisputable blurring of the old sharp delienations between the work performed by the members of the various crafts involved. These unions did attempt to respond to the compelling factors opposing the retention of separate bargaining rights. They created a council of shopcraft unions which was certified by this Board as the single bargaining agent for all of them in at least two major railway enterprises in Canada, namely, the CNR and the CPR. Unfortunately they could not make it work and it led to a very serious conflict which this Board was called upon to adjudicate. It revoked that certification in Canadian National Railway Company et al. (556), supra, and separate bargaining certificates were reestablished. As was so aptly stated in Canadian National Railway Company, (1991) 83 di 216 (CLRB no. 845), the substantial issue in Canadian National Railway Company et al. (556), supra, "was one of the viability of the council of trade unions." That case did not raise the issue of the continued appropriateness of separate certifications of

some railway unions on the basis of craft lines. None of the parties raised it in that case.

When the Canadian government decided to create VIA Rail with the attendant transfer of groups of employees of CN and CP to VIA Rail, as related above in these reasons, the same process was followed by the craft unions representing the craft employees so transferred. They all asked the Board to certify them separately. And VIA Rail never raised the issue it now raises in the instant application.

The only new element which occurred in the intervening years, between the end of 1985 and the present, was the raid by one of the craft unions involved, namely the IAM, on two of these certified craft bargaining agents, the Boilermakers and the Sheetmetal workers. It succeeded. The IAM was substituted by this Board and the number of bargaining units was reduced. But more about that later.

A major portion of the evidence of VIA Rail dealt with differences between its rolling stock servicing and maintenance operations compared to those of CN which have rendered the bargaining unit structure it inherited from CN inappropriate to the needs of VIA Rail, as well as constituting a source of labour relations problems and creating serious inefficiencies. Whereas at CN, and at CP for that matter, the maintenance operations performed at large "back shops" were characterized by the complete repair of many components of freight cars and locomotives and the fabrication and reconstruction of many major components of this equipment, the approach at VIA Rail, in its main maintenance centres, is characterized by the wholesale replacement of components which need repairs by

components which are reconditioned outside or brought in new from subcontractors.

Whereas at CN, the train consists are fragmented and their elements worked upon separately during programs lasting for long periods of time prior to their being returned to service, VIA brings in its trains into its new modern maintenance facilities and keeps them whole. Minor repairs are done where required, components where major repairs would be required are replaced and the consists are turned back into service in a relatively short period of time.

A number of consequences on the quantity and type of craft work required by the two railroads flow from these differences. The two main ones can be depicted as follows.

- 1) The craft employees work in gangs at VIA as well as at CN. However the gangs at VIA are composed of a mix of employees of different crafts working on a train consist under the supervision of a single superior who may belong to a different craft. Not so at CN where one will find gangs consisting of employees of a single craft supervised by one of their own craft.
- 2) The absence of fabrication of large components or major repairs on them at VIA as well as the type of minor repairs performed has greatly decreased the need for numerous employees heavily engaged in using their specific craft skills. An analysis produced in evidence shows that each task having been evaluated, out of a total of 1660 of them, 1338 or 80.4 % could be performed by any craft with up to one week of training and 326 of them or

19.6% require high technical craft skills applied by members of different crafts. This evidence was not contradicted.

In other words, the volume of work involved in VIA's maintenance operations is considerably smaller when compared to CN's and its nature requires far less specialists' work. VIA sends much of its repair work outside in two ways:

- 1) complete locomotives and cars for the main engine renewal, main generator renewal, truck renewal (both cars and locomotives), fire and wreck damage (both cars and locomotives) and for some major or specialized modifications (both cars and locomotives);
- 2) as to components changeouts or repairs, VIA stocks 1600 repairable components. When components fail, most are replaced from new stock or sent to outside contractors for rebuild. Only 5% of these components are repaired by VIA.

There is no doubt that the servicing and maintenance operations at VIA have become very different from those at CN or at CP.

VIA argues that this difference makes it essential for it to make assignments of craft work strictly on the basis of ability and qualifications to perform the tasks in order to operate with efficiency. It must have flexibility in these assignments. It cannot do so with the present bargaining unit structures where all craft bargaining agents have brought along with them in their collective agreements

craft rules with which the supervision over craft employees has to contend with in assigning the employees. The evidence showed the existence and application of these craft rules.

In this connection, it is interesting to note that the IAM, which successfully raided the Sheetmetal Workers and the Boilermakers, still signs three collective agreements at VIA. The IAM signs its own, with craft rules in it, which is collective agreement no. 7. They then sign a separate collective agreement (no. 5), pertaining to the Sheet Metal Workers and also a separate collective agreement (no. 6) pertaining to the Boilermakers. Significantly however, these two additional collective agreements contain nothing but a clause making all the terms of the IAM specific collective agreement applicable to the Sheet Metal Workers and a reproduction of the craft rules of the Sheet Metal Workers, i.e. Rule 21, and to the Boilermakers, again with a reproduction of the craft rules of the Boilermakers, i.e. Rules 21 and 31.

The evidence of VIA established that the application of the craft rules of these craft unions led to some jurisdictional disputes between themselves and with VIA Rail. Although these were not as severe as the employer would have had us believe, some still restricted flexibility in work assignments. For instance, VIA filed a large number of grievances dealing with that type of dispute. However it was finally ascertained that very few ended up in arbitration. Furthermore, the craft unions countered this evidence with proof that the difficulties created by the application of these craft rules had been alleviated by the introduction at VIA of the "incidental

work rule" which had been developed in the other major railroads.

Could the existence of those craft rules and the attendant restrictions on work assignments be eventually bargained out of the collective agreements? Referring to what both the Sheetmetal Workers and the Boilermakers held out as being the rock bottom essential to be retained as their working conditions differing from those enjoyed by the Machinists, that is their specific craft rules, it is very doubtful. There is no doubt that the existence of separate bargaining agents for craft employees appears to be justified only for the preservation of these craft rules.

VIA also produced evidence that the present bargaining structure has created labour relations problems in the negotiation process. Prior to the hearings in this case, there had been two sets of negotiations. The first one was difficult. Instead of creating a common front of all of these craft unions at one single bargaining table, there was a history during those negotiations of alliances between some which broke down and were replaced by different ones which in turn became unstuck with the result that these negotiations had to be finalized at many bargaining tables. However the last set of negotiations was conducted and finalized at one single bargaining table, with all craft unions in a common front. The unions argued that this last evidence contradicted the allegations of VIA. However, when one considers that said negotiations took place after the filing of the present application by VIA, one has to question their probative value.

VI

When Parliament amended the Canada Labour Code in 1972 by abolishing the provisions which until then had protected separate bargaining rights for craft workers, it was sending a signal to this type of employees and the unions which were their bargaining agents. The Woods Task Force Report, which had gathered recommendations for changes in the Code, had deplored the multiplicity of small bargaining units or fragmentation of bargaining rights in many industries in Canada. On the other hand, the Code vested the Board with great discretion in the difficult task of determining appropriate bargaining units. Since 1973, this Board has laid down in numerous decisions its policy regarding the determination of appropriate bargaining units. Firstly, it recognized that it would be a function calling for the assessment of each individual bargaining situation. Secondly, it declared itself, generally speaking, in favour of broader-based collective bargaining and therefore, large and comprehensive bargaining units. Eventually, it issued many decisions elaborating on the soundness of large industrial units, but also some decisions where it went the other way and carved out large units into smaller ones where it found the work, skills and community of interests of several groups of employees in an enterprise were very clearly different. Two of the most recent decisions of the Board exemplify this flexibility by the Board. (See Air BC Limited (1990) 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), dealing with fragmentation of bargaining units and Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675) dealing with broader based bargaining units).

As regards craft employees, this Board determined many years ago that in the construction industry it would generally respect bargaining structures based on strict craft lines, a separate unit per each craft. In other industries, however, it became stricter in the granting of certifications along craft lines. More and more, one notices comprehensive bargaining units comprised of craft employees intermingled with all other types of employees and established along industrial lines.

In this regard, the evidence at VIA Rail regarding the operations of the servicing and maintenance of rolling stock shows that this enterprise looks more like any large industrial plant. This Board did not determine that it favoured fragmentation of units for craft employees in the railway industry, it inherited that situation.

The problem is that, with the passage of time, there evolved a serious blurring of the delineations between the various crafts in the railway industry, more so at VIA Rail as we have just seen. More and more every skilled journeyman in every craft could and does, with relatively little training, perform a very large number of all the tasks required to be performed. There are still tasks which do and will go on requiring the specific professional skills of members of different crafts. At VIA, as we already pointed out, that now represents only 326 tasks out of a total of 1664. There are practically no more separate gangs composed entirely of members of each craft. All craft workers are assigned to composite gangs and there is considerable overlap in the tasks performed by members of the different bargaining units. There are common supervisory functions and many operational contacts between members of various units. There are common facilities

shared by all. Members of all craft units receive the same wage and fringe benefits, and terms and conditions of work as per their respective collective agreements are mostly identical. They all receive similar levels of training.

VII

We now come to the conclusion that separate units of craft employees are no longer appropriate for collective bargaining purposes at VIA Rail.

The present bargaining structure flies in the face of many criteria laid down by this Board for the justification of establishing more comprehensive units.

- 1) There is no doubt that there is a substantial and distinct community of interest among all the craft employees affected by the application. It is not respected.
- 2) The administration of the operations of servicing and maintenance of the rolling stock by the employer is hampered.
- 3) Collective bargaining is less convenient than it could be and less fruitful.
- 4) Labour relations stability is unfavourably affected.
- 5) The lateral mobility of all craft employees is somewhat impeded and thus, their long-term job security.

- 6) There are work jurisdiction disputes.

The existence at VIA of the following factors is not reflected in the present bargaining structures:

- a) overlap in the work performed by all craft employees;
- b) similarity in collective agreement provisions;
- c) intermingling of members of all the craft units in the overall operations of servicing and maintenance of rolling stock;
- d) the increased power of the collectivity represented by all craft workers with the attendant benefits to all of them if they were in one bargaining unit.

A single unit of all shopcraft employees at the employ of VIA Rail is therefore determined by the Board.

Prior to turning to the question of the bargaining agent that shall be entitled to represent these employees, we have to deal with the response of the CBRT & GW which may be characterized as an oblique application for certification under the guise of an application for review by an employer under the provisions of section 18 of the Code.

The Board dismisses the request of the CBRT & GW as inappropriate and unacceptable under the provisions of the Code. Furthermore, this panel of the Board does not believe that it is sound practice to establish as appropriate a bargaining unit composed of white-collar and blue-collar employees.

This brings up that part of the application of VIA Rail requesting the Board to carve out of the CBRT & GW "off-train" bargaining unit, those blue-collar employees which perform some tasks in the maintenance and servicing of its rolling stock.

The Board was not involved in the decision of VIA Rail to enter into a "voluntary recognition" of CBRT & GW as bargaining agent for the "off-train" bargaining unit composed of both a large group of white-collar employees and some blue-collar employees. Of course, there was the eventual certification granted by the Board recognizing that unit. A research of the Board's files does not reveal the reasons for that decision. However, collective bargaining took place on the basis of that "voluntary recognition" and that generated rights, benefits and advantages for these employees that the Board does not feel should be tampered with, without very extensive exploration of the resulting consequences and definitely not at this time.

The Board has determined that the appropriate bargaining unit shall comprise:

"All the employees at the employ of VIA Rail Canada Inc. assigned to the inspection, maintenance and servicing of rolling stock, excluding those already certified with the Canadian Brotherhood of Railway Transport and general Workers in a certification order issued by the Canada Labour Relations Board on January

25, 1985 and covered by Wage Agreement no. 1 and excluding employees covered by certification orders issued by the Canada Labour Relations Board to other bargaining agents."

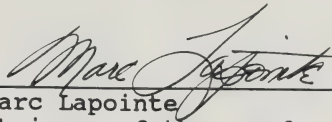
This definition of the bargaining unit determined to be appropriate by the Board does not affect and does not intend to affect the bargaining rights of the BMW as recognized by VIA Rail in their collective agreement no. 9.

A representation vote shall be conducted by the Canada Labour Relations Board to ascertain the wishes of the employees affected by this decision. The Investigating Officer will be contacting the parties with respect to the taking of the vote within the next two weeks.

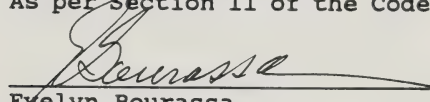
All employees employed at the date of this decision by VIA Rail Canada Inc. in the inspection, maintenance and servicing of rolling stock shall be eligible to vote and choose between:

- 1) the International Association of Machinists and Aerospace Workers (members of the Machinists unit, the Boilermakers unit and the Sheetmetal Workers unit);
- 2) the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada;
- 3) the International Brotherhood of Electrical Workers;
- 4) the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada).

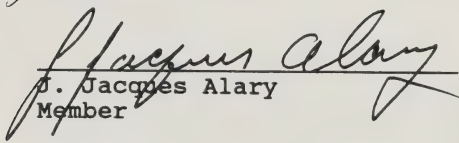
This constitutes a unanimous decision of the panel.



Marc Lapointe
Chairman of the panel.
As per Section 11 of the Code



Evelyn Bourassa
Member



J. Jacques Alary
Member

ISSUED at Montreal this 8th day of October 1992.

information

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Summary

GENERAL TEAMSTERS LOCAL UNION NO.
362, APPLICANT, AND EXALTA TRANSPORT
CORP. AND/OR CHIEF TRANSPORT LTD.,
EMPLOYER.

Board File: 555-3455

Decision No.: 964

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Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Résumé de Décision

LA SECTION LOCALE 362 DU SYNDICAT DES
TEAMSTERS (GENERAL TEAMSTERS)
REQUÉRANTE, AINSI QUE EXALTA
TRANSPORT CORP. ET CHIEF TRANSPORT
LTD., EMPLOYEUR.

Dossier du Conseil: 555-3455

Décision n°: 964

These reasons deal with the issue of
whether the Canada Labour Relations
Board has constitutional jurisdiction
to regulate the labour relations of
Exalta Transport Corp. and/or Chief
Transport Ltd. This question arose
when the union sought bargaining
rights by way of an application for
certification affecting company
drivers purportedly employed by one
or the other of these companies.

The application was dismissed. The
Board found that neither company
falls within the meaning of a federal
work, undertaking or business under
the Canada Labour Code (Part I -
Industrial Relations). In its
reasons, the Board briefly refers to
the tests that are applicable to
these situations. On the facts
before it, the Board found that the
two companies in question are in fact
an integral part of a single
transportation undertaking, the core
functions of which are intra-
provincial. The extra-provincial
activities carried on by Exalta
Transport Corp. are not of the
regular and continuous nature
required to convert this whole
operation into a federal undertaking.

Les présents motifs traitent de la
question de savoir si le Conseil
canadien des relations du travail a
la compétence constitutionnelle
voulu pour régler les relations
du travail de Exalta Transport Corp.
et Chief Transport Ltd. Cette
question a été soulevée lorsque le
syndicat a présenté une demande
d'accréditation en vue d'obtenir les
droits de négociation à l'égard des
chauffeurs qui travailleraient pour
l'une ou l'autre de ces compagnies.

Le Conseil rejette la demande. Le
Conseil juge que les deux compagnies
ne constituent pas des entreprises
fédérales au sens du Code canadien du
travail (Partie I - Relations du
travail). Dans ses motifs, le
Conseil fait brièvement état des
critères applicables dans ces cas.
D'après les faits présentés, le
Conseil estime que les deux
compagnies font partie intégrante
d'une seule entreprise de transport,
dont les fonctions principales sont
provinciales. Les activités
extraprovinciales exercées par Exalta
Transport Corp. ne sont pas de nature
régulière et continue, élément
essentiel pour en faire une
entreprise fédérale.



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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

General Teamsters Local
Union No. 362,

applicant,

and

Exalta Transport Corp.
and/or Chief Transport Ltd.,

employer.

Board File: 555-3455

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Murray McGown, Q.C., for the applicant; and
Mr. Murrey Dubinsky, Q.C., for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with the Board's constitutional jurisdiction over the labour relations of Exalta Transport Corp. and/or Chief Transport Ltd. (Exalta and Chief). This issue arose in an application for certification that was filed on May 1, 1992 by the General Teamsters Local Union No. 362 (the Teamsters or the union) seeking to represent a bargaining unit described as:

"all company drivers employed with Exalta Transport Corp., and/or Chief Transport Ltd., excluding owner operators"

In its response to the application Exalta submitted that it has no company drivers. Chief admitted employing company drivers; however, it claimed that its operations fall within provincial jurisdiction. By the time this matter was heard by the Board at Calgary on August 25, 1992, the constitutional jurisdiction challenge had extended to the operations of Exalta.

On September 10, 1992, the parties were notified that the Board had found that neither Exalta or Chief are federal works, undertakings or businesses within the meaning of the Canada Labour Code (Part I - Industrial Relations). The application for certification was dismissed accordingly. These are the Board's reasons for so finding.

II

Exalta and Chief are both engaged in truck transportation businesses, therefore, the question of which jurisdiction their operations fall under depends on the nature of any extra-provincial activities which they may carry on. If such extra-provincial activities are regular and continuous it usually follows that the undertaking is federal because it extends beyond the Province or connects the Province with another Province as contemplated by section 92(10)(a) of the Constitution Act, 1867:

"92. (10) Local Works and Undertakings other than such as are of the following Classes:-

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."*

The leading cases in this area are: Attorney General of Ontario et al. v. Winner, [1954] A.C. 541, 71 C.R.T.C. 225, 13 W.W.R. 657 sub nom S.M.T. (Eastern) Limited. v. Winner (P.C.); Regina v. Cooksville Magistrate's Court; Ex parte Liquid Cargo Lines Ltd. (1964), 46 D.L.R. (2d) 700, [1965] 1 O.R. 84 (H.C.J.); Re Tank Truck Transport Ltd. (1960), 25 D.L.R. (2d) 161, [1960] O.R. 497 sub nom. Regina v. Toronto Magistrates; Ex parte Tank Truck Transport Ltd. (H.C.J.); and Ottawa-Carleton Regional Transit Commission v. A.T.U., Local 279 et al. (1983), 84 CLLC 14,006 (Ont.C.A.).

In the latter of these cases, Ottawa-Carleton Regional Transit Commission et al., supra, the Court of Appeal of Ontario confirmed that the proper test is to determine whether the extra-provincial operations of the business in question are indeed regular and continuous:

"There is a long history of decisions pertaining to the trucking and transportation industry. These authorities have rejected a quantitative approach which would determine the result based upon a comparison of the extra-provincial business to the business carried on within the province. Instead, the decisions have turned upon a finding that the extra-provincial operation was a continuous and regular one. If the extra-provincial operation was found to be continuous and regular, then the undertaking was determined to be one which connected provinces. There is no reason, in my view, to depart from that line of decisions which has for many years governed the transportation industry. The test used in those authorities is a reasonable one and it can be readily applied."

(page 12,030; emphasis added)

III

It became evident at the hearing into these matters that there are actually three business entities involved here rather than just the two named in the application for certification. In addition to Exalta and Chief, there is another company known as Medalta Transport Ltd. (Medalta) which is a key player in these constitutional jurisdiction considerations. In fact, Medalta is the major entity in this inter-related corporate family. Its business is really the core operation without which the other two do not exist.

At the hearing, the Board heard evidence from the President of all three companies, Mr. John Finn. Mr. Finn explained the corporate and operational relationship between Medalta, Exalta, and Chief, and described the evolution of the role played by Exalta and Chief in Medalta's business. He also related how the operations of these companies had developed over the past twenty years or so from the original parent company, Medicine Hat Moving and Storage. This background gave us a valuable insight into why these companies operate as they do; however, for our purposes there is no need to repeat this history; we need only look at the operations as they exist today.

In capsulized form, here are the constitutional facts before us. Medalta is in the business of truck transportation of less than a truckload (L.T.L.) of general freight predominantly within and along corridors connecting Calgary, Medicine Hat, Brooks, Lethbridge and Edmonton. At each of these locations Medalta operates

terminal facilities where freight that is picked up locally at the aforesaid locations or, that comes in on the inter-city network, is sorted and dispatched to its final destination. Terminal operations such as these with warehouse employees are a necessary feature of L.T.L. trucking. Medalta also employs pick up and delivery drivers (P & D). These warehouse employees and the P & D drivers are represented by the Teamsters by virtue of a provincial certification order issued by the Alberta Labour Relations Board back when the business was known as Medicine Hat Moving and Storage.

Medalta does not operate over the road, nor does it have any running rights outside the Province of Alberta. This aspect of its business is reserved for Exalta which, incidentally, only became fully operational late in 1991. All of Medalta's over-the-road (between terminals) and extra-provincial work is contracted to Exalta which hauls strictly full loads of general freight (F.T.L.). Apparently, this hiving off of F.T.L. operations to a separate related company is a common practice now in the de-regulated trucking industry.

Exalta is authorized to transport full loads within Alberta and into British Columbia and Saskatchewan. It also has the necessary running rights from the Interstate Commerce Commission (I.C.C.) to transport goods into Montana. However, Exalta has no trucks and no drivers. All it possesses are the running authorities and some sixty or so trailers. It has no staff and no payroll whatsoever. All of its administrative work is done by Medalta.

This is where Chief comes into the picture. Chief is a tractor service company. It provides tractors and drivers

to Exalta. It also supplies tractors to Medalta for its local P & D work. These tractors operate under Medalta and Exalta's running rights. In fact, what really happens is that Chief's half dozen or so tractors are used during the day to supplement Medalta's fleet for P & D work where they are driven by Medalta drivers. These same tractors are then used at night to haul Exalta trailers over the road between Medalta terminals. When so used, they are driven by Chief drivers. These drivers are hired by Chief and paid by Chief, however, they are dispatched for these purposes by Medalta's terminal managers. On occasions, Chief tractors haul Exalta trailers out of Alberta into British Columbia, Saskatchewan, and Montana.

These are the basic functions of Medalta, Exalta and Chief and, against that background, keeping in mind that we are dealing only with the question of jurisdiction and not who is the true employer for the purposes of Part I of the Code, we shall now zero in on the extra-provincial aspect of these operations.

Clearly, Medalta and Chief in their own right are not authorized to nor do they operate outside Alberta. Only Exalta ventures beyond the provincial boundary. According to the documentation before us, notwithstanding that Exalta holds itself out as an extra-provincial carrier, it operates as such only on a sporadic and irregular basis.

Prior to April 1992, there certainly were signs of what appeared on its face to be consistent extra-provincial activities; however, when analyzed we have concluded that it does not meet the test of regular and continuous. At first glance it appeared that regular trips were going into and out of Montana but this can be attributed to a single customer of Medalta that no longer uses this

company for its transportation needs. Since that contract was lost, if one looks at the period since May 1992, there has been some seven intermittent trips into Montana.

It was the same with the figures showing trips into and out of British Columbia. Initially, the twenty-one trips listed for the period April 14 to May 15, 1992 caught our attention. However, this turned out to be a seasonal spurt that is unlikely to occur again. It involved hauling bedding plants and flowers from British Columbia. Even if it does occur again, this can hardly be characterized as regular and continuous. Since May 15, 1992 there has been only eight sporadic on-demand trips to or from B.C. Six of these were in June, two were in July. There were no trips in August.

As for Saskatchewan, there were two trips in May and five in June. Again, on demand and clearly sporadic. There were no trips at all during July or August.

Referring to the overall extra-provincial picture, Mr. Finn testified that this apparent decline in what really has never been a substantial extra-provincial market, is in line with the direction being pursued by the corporate family. Its bread and butter main core business is its intra-provincial, Calgary, Medicine Hat, Brooks, Lethbridge and Edmonton network. This is where the concentration is focused. In fact, the Edmonton terminal was only opened earlier this year to facilitate the achievement of corporate goals intra-provincially. Any extra-provincial work that happens along is purely incidental to the core business and, while it will not be turned away, it is not the intention of Medalta to compete seriously in the extra-provincial market through Exalta.

IV

Based on those facts, which are for the most part undisputed, what we have here, regardless of the corporate structures, is a single integrated transportation undertaking. It is also clear that the core functions of this undertaking are those of Medalta which operates exclusively within the bounds of the Province of Alberta. The two subsidiary companies, Exalta and Chief are, without question, integral parts of this whole operation.

Incidental to that core intra-provincial operation, some extra-provincial work is carried on through Exalta. However, for our purposes here, we cannot in the circumstances view Exalta as a separate and distinct entity. On its face, Exalta lacks the basic ingredients necessary for it to be considered as a business for the purposes of the Code. It has no structure, no management, no employees, which of course means that it is not an employer and, therefore, it has no labour relations that can be governed by the Code. In short, Exalta is no more than a corporate shell that has been created to suit the needs of Medalta.

There is, of course, nothing wrong with businesses structuring themselves in any manner that suits their particular needs; however, when it comes to determining constitutional jurisdiction we have to look at the reality of the situation, not the commercial costumes worn by the entities involved:

"Underlying many of the arguments is an unjustified assumption that by choosing a particular corporate form the various players can control the determination of the

constitutional issue. This Court has made it clear in this area of constitutional law that the reality of the situation is determinative, not the commercial costume worn by the entities involved."

(Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications, [1989] 2 S.C.R. 225 at page 263; emphasis added)

The reality of this situation is that Medalta, Chief, and Exalta are a single integrated intra-provincial transportation undertaking which cannot, in the present circumstances, be transformed into a federal undertaking by virtue of the extra-provincial facet of the operations. In our view, the intermittent on-demand nature of the extra-provincial work here is not of the regular and continuous nature that is required to oust the primary presumption of provincial competence over labour relations:

"(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule."

(Northern Telecom Limited v. Communications Workers of Canada, [1980] 1 S.C.R. 115, at page 132; emphasis added)

There are, of course, exceptions to the exclusive provincial jurisdiction rule and, in that same decision from which we have just extracted the above quote, the Supreme Court of Canada laid out the ground rules for determining whether an undertaking, work or business is federal:

"(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation."

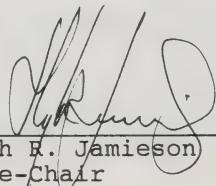
(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."

(Northern Telecom Limited, supra, at page 132; emphasis added)

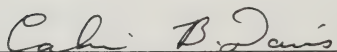
In this case, the normal and habitual activities of the single integrated undertaking in question is clearly that of intra-provincial transportation. On the facts before us at this time, the extra-provincial work can only be described as a casual feature of the operation, therefore, it is our finding that there are no federal works, undertakings or businesses affected by the application for certification by the Teamsters.

The application is dismissed accordingly.

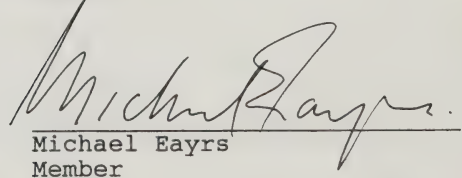
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 16th day of October, 1992.

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Summary

CANADIAN UNION OF POSTAL WORKERS,
COMPLAINANT, AND CANADA POST
CORPORATION, RESPONDENT.

Board Files: 745-4036
745-4060

Decision No.: 965

Résumé de Décision

LE SYNDICAT DES POSTIERS DU CANADA,
PLAIGNANT, ET LA SOCIÉTÉ CANADIENNE
DES POSTES, INTIMÉE.

Dossiers du Conseil: 745-4036
745-4060

Décision n°: 965

Canada Post Corporation paid less compensation in respect of the Labour Day holiday in 1991 to employees who engaged in legal, rotating strike activity between August 24 and September 5, 1991 than it paid to persons who did not strike but stayed on the job throughout the period.

The Board agreed with the claim of the Canadian Union of Postal Workers that this constituted a violation of section 94(3)(a)(vi) of the Canada Labour Code (Part I - Industrial Relations) which prohibits an employer from discriminating against or disciplining any person with respect to pay and any other aspect of employment because the person has participated in a legal strike.

The Board ordered Canada Post Corporation to pay compensation to these employees equivalent to that which they would have received had they not engaged in legal strike activity.

La Société canadienne des postes a versé, aux employés qui avaient participé aux activités de grèves tournantes légales de la période du 24 août au 5 septembre 1991, une rémunération moins élevée à l'égard du congé de la Fête du travail qu'aux employés qui n'avaient pas participé à ces activités et qui n'avaient pas quitté leur emploi au cours de cette période.

D'après le Syndicat des postiers du Canada, il s'agit là d'une violation du sous-alinéa 94(3)a)(vi) du Code canadien du travail (Partie I - Relations du travail), qui interdit à un employeur de faire des distinctions injustes en matière de salaire ou d'autres conditions d'emploi ou de prendre d'autres mesures disciplinaires à l'encontre d'une personne qui a participé à une grève légale. Le Conseil a fait droit à la demande.

Le Conseil ordonne à la Société canadienne des postes de verser aux employés visés une rémunération équivalant à celle qu'ils auraient touchée s'ils n'avaient pas participé à une grève légale.



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Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Union of Postal
Workers,

complainant,

and

Canada Post Corporation,

respondent.

Board Files: 745-4036
745-4060

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Ginette Gosselin and J. Jacques Alary.

Appearances:

David Migicovsky and Charles Hurdon, for the Canadian Union
of Postal Workers; and

Stephen Bird, for Canada Post Corporation.

These reasons for decision were written by Vice-Chairman
Eberlee.

I

These files involve complaints by the Canadian Union of
Postal Workers (CUPW) that Canada Post Corporation (CPC)
violated section 94(3)(a)(vi) of the Canada Labour Code
(Part I - Industrial Relations) by allegedly discriminating
against employees who had engaged in legal, rotating strike
activity between August 24, 1991 and September 5, 1991.

Specifically, it was claimed by CUPW that CPC paid these employees only straight time for work done on the Labour Day holiday, September 2, 1991, plus a compensating day off, while persons who did not engage in any strike activity and worked on Labour Day received the amount specified in the expired collective agreement - pay for the day plus two times their straight time rate for the time worked. CUPW also alleged that employees who were involved in rotating walk outs and did not work on Labour Day had to work the day before and the day after in order to receive holiday pay for that day; non-participants in the strike activity who did not work on Labour Day were said to have received holiday pay, based on the provision of the collective agreement (article 18.03) which requires attendance only on the day before or the day after the holiday.

Section 94(3)(a)(vi) reads as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part; ..."

File 745-4036, although alleging roughly the same violations, was specific to Thunder Bay, Ontario, while file 745-4060 applied to CPC employees across the country. The two files were consolidated and a hearing into the matter was held in Ottawa on July 15, 1992.

II

The Board was told that by August of 1991, it was clear to Canada Post that a strike by CUPW members was probable. CPC decided, however, to remain in operation and to continue to move the mail by whatever means it could devise, even in the face of an employee walkout. According to Gilles Courville, Corporate manager of labour relations, as soon as it became legal to do so on or about August 24, 1991, Canada Post declared the existing collective agreement to be no longer in force; this was designed as an economic sanction, intended to pressure the union in the direction of concluding a new collective agreement. Termination of the collective agreement meant that the grievance procedure was eliminated; union officials could no longer claim rights of entry to Corporation premises; some replacement workers were hired; some selective lockouts occurred.

Mr. Courville presented to the Board a letter he had sent to then CUPW President, Jean-Claude Parrot, in which the termination of the agreement was announced. The letter was intended to outline the terms and conditions of employment that would apply until a new collective agreement was concluded. According to Mr. Courville, the letter also was intended to make it clear that those people who did not work throughout, who exercised the right to strike, were

not necessarily eligible for the terms and conditions set out therein. The intent was to "make a difference" between people who worked and people who struck, to put economic pressure on the employees who engaged in strike activity. Another letter, similar in content, was sent over Mr. Courville's signature to all employees, to notify them of the changed situation. Neither letter was specific about precisely what terms and conditions of employment would be different as between strikers and non-strikers. However, an internal CPC directive had made it clear by September 5, 1991 that the distinction would be applied to the Labour Day holiday compensation. It was stated in this directive that there were to be two categories of employees for the purpose of statutory holiday pay: non-strikers and strikers.

III

David Kenny, second vice-president of CUPW's Ottawa local, testified that groups of Ottawa employees engaged in rotating strike activity on August 24, 25, 26, September 3 and 4, 1991. Employees at other CPC locations across Canada walked out on these and other dates too. What took place was a series of short walkouts and returns to work for brief periods of time. This process was legal.

The Board was told that work schedules are posted two to four weeks ahead of time; everybody at the Ottawa processing plant was scheduled to have Labour Day off. However, management of the Ottawa plant needed some employees to work that day. People were called by managers and were asked if they would like to work; no distinction was made at the time of calling between those who had been involved in the strike activity and those who had not. In

the end, however, distinctions were drawn in the payments made to rotating strikers and non-strikers. The latter received what the expired collective agreement provided. The persons who had engaged in rotating strikes during that period, although they were willing to work, and did work, on Labour Day were not similarly rewarded. There was some exception to this in the case of certain strike supporters who were promised double time by the managers who called them and asked them to work, but this was explained as resulting from administrative confusion.

IV

Counsel for Canada Post argued that while there was no doubt about the facts of the case - that CPC did distinguish between strikers and non-strikers - this discrimination was not illegal. It was part of the normal process that an employer would engage in to react to, and deal with, rotating strikes. The Code exists to facilitate free collective bargaining; Canada Post's action, in distinguishing between employees who had struck and those who had not done so, was simply "economic warfare" of the kind that is permissible and is normally utilized to put pressure on a union in the context of collective bargaining, to compel it to come to terms. If the only legitimate response to rotating strikes was lockout action by the employer, this would be like forcing somebody to use a sledgehammer when a fly swatter would do. Counsel suggested that "something less is always better." He argued that what Canada Post had done was simply consistent with the comment in Canadian Industrial Relations: The Report of Task Force on Labour Relations (Ottawa: Privy Council Office, December 1968) (Chair: H.D. Woods) that

"... collective bargaining is designed to resolve conflict through conflict, or at least through the threat of conflict" (paragraph 392).

V

In another decision, Canada Post Corporation (1992), as yet unreported CLRB decision no. 930, involving the same parties, and having to do with action taken by Canada Post which was alleged by CUPW to be in violation of the same provision of the Code, a somewhat differently constituted panel of this Board said:

"The line between legitimate employer reaction to employee/union strike activity and illegitimate employer response is not easy to define for any and all purposes and at this point appears to be capable of being drawn only on a case-by-case basis. ..."

(page 17)

The Board decided there that Canada Post had engaged in legal rotating lockout activity to counter CUPW legal rotating strike activity and that this, while certainly impacting on the employees locked out, was not conduct that constituted any sanction or discrimination against any person for having participated in legal strike activity. The situation in the instant case cannot, however, be likened in any way to that described above.

Numerous cases decided by this Board and by other labour relations boards have indicated which tactics are illegal in specific collective bargaining conflict situations. It can be said, generally speaking, that the approaches which have been deemed illegal are the exception, rather than the

rule. An employer can change terms and conditions of employment for all employees once the conciliation requirements of the law have been exhausted; it can preemptively, or in a countervailing fashion, engage in general lockout or rotating lockout activity; it can hire replacement workers; it can even go out of business. But it cannot take action that involves sanctions or discrimination against specifically identified or identifiable employees because they exercised their right to strike.

In Graham Cable TV/FM (1985), 62 di 136; 12 CLRBR (NS) 1; and 85 CLLC 16,058 (CLRB no. 529), the Board determined that an employer could not discipline employees for conduct which was part and parcel of legal rotating strike activity. In another case before the Board, Rogers Cable T.V. (British Columbia) Ltd. (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616), the panel decided that discipline had been misused against persons who had engaged in legal strike activity.

The case decided by the Canada Labour Relations Board which seems closest to the instant case is Air Alliance Inc. (1991), 92 CLLC 16,013 (CLRB no. 887). In this case, employees who participated in strike activity were excluded by the employer from the benefits of a company profit-sharing plan. The Board found this to be in contravention of section 94(3)(a)(vi).

In the instant case, some persons who were doing the same work as their fellows on Labour Day were given by Canada Post a different and lesser benefit for that work. The basis for the difference was that they had engaged in rotating strike activity (which they had a right to do

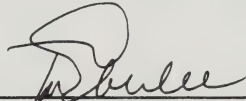
under the Code) while the other people had not. They were certainly discriminated against by Canada Post and it was quite clearly because they engaged in strike activity.

This panel finds it impossible to accept that this particular tactic can be deemed to be on the permissible side of the scale of employer conflict tactics. It is so specifically targeted at those who were exercising their right to strike that it cannot be interpreted as other than the kind of retaliation for such activity which section 94(3)(a)(vi) seeks to proscribe.

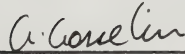
The Board finds that Canada Post Corporation has breached the Code in the way it treated rotating strikers versus non-strikers in respect of the Labour Day holiday in 1991.

Under section 99 of the Code, the Board requires Canada Post Corporation to compensate rotating strikers employed at any and all of its operations across Canada on the same basis as it compensated non-strikers in respect of the Labour Day holiday in 1991. Every rotating striker who was denied any benefit or compensation that was given to non-strikers shall be paid a sum equivalent to the difference between what he or she was actually paid and what he or she should have received as per the foregoing, no later than 30 days after the date of these Reasons for decision.

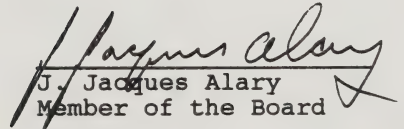
The Board appoints Gérard Legault, Director General, Operations (Chief Registrar), or a person designated by him, to assist the parties to implement this decision. At the same time, the Board will remain seized of these complaints in order to deal with any question which may arise in respect of the implementation of this decision and to make any determination of a general nature, or of a nature specific to individuals, with respect to the compensation to be paid by Canada Post Corporation.



Thomas M. Eberlee
Vice-Chairman



Ginette Gosselin
Member of the Board



J. Jacques Alary
Member of the Board

ISSUED at Ottawa, this 19th day of October 1992.

information

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Summary

Résumé de Décision

VIA RAIL CANADA INC., APPLICANT, AND
HARRY FINLEY, RESPONDENT.

VIA RAIL CANADA INC., REQUÉRANTE, ET
HARRY FINLEY, INTIMÉ

Board File: 530-2110

Dossier du Conseil: 530-2110

Decision No.: 966

Décision n°: 966

These reasons deal with the Board's
dismissal of an application for
reconsideration of a decision
rendered in Harry Finley (1992), as
yet unreported CLRB no. 948.

Les présents motifs portent sur le
rejet par le Conseil d'une demande de
réexamen de la décision rendue dans
Harry Finley (1992), décision du CCRT
n° 948, non encore rapportée.

The application puts into question
the effect of section 133 with
respect to the timeliness of an
application brought pursuant to
section 147(a).

La demande met en doute l'effet de
l'article 133 quant au respect des
délais d'une demande fondée sur
l'alinéa 147a).

The Board determined that the
"complaint" described in section
133(2) refers to the complaint made
against the employer for action taken
against an employee for raising a
safety concern. The Board
accordingly holds that the 90-day
time limit, referred to in section
133(2), for filing the complaint
begins to run from the date the
employer took the prohibited actions
versus the employee and not the date
on which the employee raises the
safety concerns pursuant to section
128.

Le Conseil estime que la «plainte»
mentionnée au paragraphe 133(2) fait
référence à une plainte portée contre
un employeur pour avoir posé des
gestes à l'encontre d'un employé qui
a fait part de ses préoccupations de
sécurité. Par conséquent, le Conseil
juge que le délai de 90 jours pour
déposer une plainte, mentionné au
paragraphe 133(2), court à partir de
la date où l'employeur a pris des
mesures interdites à l'encontre de
l'employé et non pas à partir de la
date où l'employé a fait part de ses
préoccupations de sécurité aux termes
de l'article 128.



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Labour
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Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

VIA Rail Canada Inc.
applicant,
and
Harry Finley,
respondent.

Board File: 530-2110

The Board was composed of Mr. Serge Brault, Ms. Louise Doyon and Mr. Richard I. Hornung, Q.C., Vice-Chairs.

Appearances (on record)

Ms. Anne Cartier, for the applicant; and
Mr. David L. Lewis, for the respondent.

These reasons for decision were written by
Mr. Richard I. Hornung, Q.C., Vice-Chair.

I

This is an application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) filed by VIA Rail Canada Inc. (hereinafter VIA) seeking a review of the decision in Harry Finley (1992), as yet unreported CLRB no. 948, issued pursuant to the Canada Labour Code (Part II - Occupational Safety and Health).

This application is governed by the Board's policy on reconsiderations (see Wardair Canada (1975) Ltd. (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434)), as it applies to decisions issued pursuant to Part II of the Code (see Canadian Broadcasting Corporation (1987), 70 di 132; and 17 CLRBR (NS) 43 (CLRB no. 636)).

The role of this panel is accordingly limited to determining whether the application raises either issues of law or of policy warranting its referral to a plenary of the Board for final disposition or issues of fact requiring its referral to the original panel for further review (see Brewster Transport Company Limited (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580)).

II

Although the application is lengthy and makes detailed reference to findings of fact made in the first instance, once distilled, VIA's reconsideration application essentially relies on the following two arguments:

1. The complainant did not comply with sections 128 and 129 of the Code with respect to the safety complaint which he made and, by virtue of section 133(1), the Board is without jurisdiction to enforce a complaint filed pursuant to section 147(a).
2. The Board erred in law when it concluded that the date of dismissal was the start of the 90-day time limit provided for in section 133(2) of the Code.

III

The relevant sections of Part II of the Canada Labour Code provide as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; ...

...

129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and

the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

...

133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128 (6) or 129 (1) in relation to the matter that is the subject-matter of the complaint.

...

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

IV

Issue No. 1

DID THE COMPLAINANT FAIL TO COMPLY WITH SECTIONS 128 AND 129 OF THE CODE AND DOES SUCH FAILURE VITIATE THE BOARD'S JURISDICTION TO ENFORCE A COMPLAINT MADE PURSUANT TO SECTION 147(a)?

A review of the sections set forth above makes it clear that, by virtue of sections 133(1) and (3), the Board only has jurisdiction to deal with complaints alleging that the employer has violated section 147(a) vis-à-vis an employee where "...the employee has acted in accordance with section 128 or 129..."

The applicant argues that Finley's failure to report his safety concerns to a health and safety representative, as envisioned in sections 128(6)(a) and (b), constitutes non-compliance with the provisions of sections 133(1) and (3) and, accordingly, the Board is without jurisdiction to now provide a remedy pursuant to section 147(a).

In the past, the Board has taken a liberal view of an employee's obligations to comply with section 128(6). It has repeatedly held that for the employee's complaint to sufficiently comply with the spirit and letter of the Code, that complaint need not be formal and detailed, provided the employer is made fully aware that the employee is refusing to work for safety reasons (see William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); Mary Glover et al. (1988), 73 di 1 (CLRB no. 672); and G. Lapointe (1992), as yet unreported CLRB decision no. 920).

In cases where the issue of the sufficiency of an employee's section 128(6) report is questioned, the Board will analyze the circumstances of the refusal to work, the manner in which the right is exercised, and whether the employer was aware that the refusal to work was based on safety concerns, in order to determine whether substantial compliance with section 128(6) has taken place.

In his decision, Vice-Chairman Eberlee, having heard all of the evidence, concluded that with respect to the June 23, 1991 incident the respondent, Finley, advised the employer that he "... intended to refuse to work if the circumstances [safety concerns] were not changed" (page 3). After this notification, a representative of the employer investigated the safety complaint, in Finley's presence, and determined it to be well founded.

The Vice-Chairman concludes:

"In the Board's opinion, Mr. Finley's advice to Mr. Shaman that he had resolved to refuse to work under certain circumstances was what is contemplated under section 128(1) of the Code:

...

It was also the report that is contemplated under section 128(6):

...

That Mr. Finley did not at this point advise a member of the safety and health committee or a safety and health representative does not in any way make his invocation of section 128 less than real or valid. This is not a procedural requirement, the absence of which in this situation rendered the process somehow outside the ambit of section 128. ... Moreover, the employer, in the person of Mr. Shaman, did not insist that he report the circumstances to a member of the committee or to such a representative. ... He took Mr. Finley seriously, as an employer basically is expected to do under the law,

and decided that Mr. Finley's claim should be investigated. Thus, he followed the fundamental requirement of section 128(7):

...

... the fact that [Finley] did not have the investigation carried out in the presence of a non-management member of the safety and health committee or of a safety and health representative does not alter the fact that the investigation was on all fours with section 128(7). ...

...

Mr. Finley did have 'reasonable cause to believe' on August 29, 1991 that a condition existed which constituted a danger to him (as he also did in June 1991 when the problem was resolved by way of a test of the train 'securement' system). ..."

(pages 3-5 and 15)

The factual issue of substantial compliance with sections 128(6) and (7) was directly addressed by the Vice-Chairman in his original determination. It is clear from a review of his decision that he was satisfied, on the basis of the evidence presented before him, that there was sufficient compliance with respect to sections 128(6) and (7), for both the June 23 and August 29, 1991 incidents, to apprise the employer of the nature of the safety complaint and the consequent refusal to work.

The application for reconsideration, based on this first issue, does not disclose any new facts or considerations that would induce this panel to refer the matter back to the original panel for consideration and disposition; (see Curragh Resources and Altus Construction Services Ltd. (1987), 70 di 186; 18 CLRBR (NS) 233; and 87 CLLC 16,034 (CLRB no. 640); and Canadian Broadcasting Corporation et al. (1992), as yet unreported CLRB decision no. 959). Accordingly, the application on this point is denied.

V

Issue No. 2

DID THE BOARD ERR IN LAW WHEN IT CONCLUDED THAT THE DATE OF DISMISSAL WAS THE START OF THE 90-DAY TIME LIMIT PROVIDED FOR IN SECTION 133(2) OF THE CODE?

Vice-Chairman Eberlee concluded that Finley's troubles began after he filed the safety complaints of June and August 1991. Following those complaints, various disciplinary measures were taken against him culminating in his dismissal on February 10, 1992. After viewing the witnesses and hearing the evidence, the Vice-Chairman concluded that the employer's conduct toward Finley during that period constituted a single continuum of concerted employer reaction to the safety complaints filed by Finley. He states:

"... the findings against Mr. Finley and the severity of the punishment were, in large part, directly attributable to his having been so assiduous in pressing his safety concerns and for having acted in accordance with section 128. ... the evidence in this case - more of which will be outlined in the following pages - convinces this Board that the dismissal of Mr. Finley for having exercised his right to refuse under section 128, and for generally being a nuisance on safety issues, was a goal which was now pursued by his supervisors. ..."

(pages 10-11)

"The treatment of Mr. Finley, the assessment of demerit marks against him which finally added up to more than 60 and resulted in his dismissal effective February 10, 1992 was not the result of several separate and isolated incidents having no relationship to his work refusal. While two of the incidents themselves pre-dated that work refusal on August 29, the punishments for all four, which appear in themselves to be either excessive or outrageous ... came after and were influenced by a desire on the part of VIA supervision to punish and be rid of Mr. Finley. To be rid of him, they had

to make sure that he amassed more than 60 demerit points. This, he had done effective February 10, 1992."

(pages 13-14)

The employer argues that notwithstanding these factual conclusions, section 147(a) is only available to an employee if the complaint is made within 90 days of the source of the discipline, i.e., the date the safety complaint is made under section 128. According to the employer, insofar as Finley's safety complaints were filed in June and July 1991 and his dismissal took place in February 1992, the Board, by virtue of section 133(2), is without jurisdiction to provide a remedy under section 147(a). This interpretation, taken to its logical conclusion, would mean that notwithstanding the fact that an employee could establish that his eventual dismissal occurred because of a safety complaint he filed, he would nevertheless be without a remedy under section 147.

We are of the view that this interpretation, urged upon us by the employer, is not reasonable.

In its decision in Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRB no. 805), the Board essentially addressed VIA's present argument in obiter and proposed:

"In another set of circumstances - for example, where an employee refused unsafe work and matters were immediately settled, but it was shown that the employer had simply been patient and six months or a year later had in fact punished the employee for the earlier refusal by firing him or her -

the Board might find that the action or circumstances arose, not at the point of the refusal, but at the point of the firing and that a complaint filed within 90 days of the latter event was timely. ..."

(page 92)

VI

The mischief that section 147 is designed to proscribe is dismissal or other disciplinary action taken against an employee for filing a genuine safety complaint. The employee "complaint" referred to in section 133(2) must therefore have reference to the "action taken" against the employee in contravention of paragraph 147(a) because the employee has "acted in accordance with section 128 or 129, ..." as referred to in section 133(1), and not the date on which a complaint was filed pursuant to section 128 of the Code. To conclude otherwise would leave open the unacceptable prospect that an employer, following a legitimate section 128 employee complaint, could simply wait for a period of 90 days from the date of that complaint to dismiss an employee.

In our view, the conclusion reached by Vice-Chairman Eberlee that:

"... Mr. Finley filed his complaint within 90 days of the date on which the company's action against him culminated in his dismissal - which was the 'action or circumstances giving rise to the complaint.'"

(page 15)

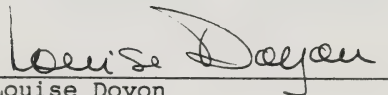
is a reasonable interpretation of section 133(2) and is in keeping with the Board's policy and previous interpretation.

The applicant's reconsideration application, based on this second issue, does not induce this panel to refer the matter to the plenary for disposition insofar as it does not raise any issue of law or of policy that warrants the same.

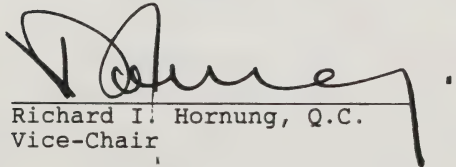
Accordingly, this application is dismissed.



Serge Brault
Vice-Chair



Louise Doyon
Vice-Chair



Richard I. Hornung, Q.C.
Vice-Chair

DATED at Ottawa this 20th day of October, 1992.

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RESUME

Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), et Association des débardeurs de Bécancour (ADB), requérants, Association internationale des débardeurs, section locale 1846 (AID), syndicat accrédité, Compagnie d'Arrimage Trois-Rivières Ltée, J.C. Malone et Compagnie Ltée, Les Élévateurs de Trois-Rivières, Somavrac Inc., et Terminaux Portuaires du Québec Inc., employeurs, Association des employeurs maritimes, représentant patronal, ainsi que Société du parc industriel et portuaire de Bécancour (auparavant Société du parc industriel du centre du Québec) et Comité des entreprises et opérateurs du parc industriel et portuaire de Bécancour, requérants en intervention.

Dossiers du Conseil:
555-3208
555-3450

Décision n°: 967

Demandes d'accréditation conflictuelles (2). Ports de Trois-Rivières et de Bécancour. Maraudage. Accréditation géographique. Secteur du débardage. Demande du SCFP fondée sur l'article 34 (accréditation multipatronale) du Code canadien du travail (Partie I - Relations du travail) en vue de déloger l'AID comme agent négociateur accrédité. Accueillie. Demande de l'ADB fondée sur l'article 24 visant à scinder une a c c r é d i t a t i o n multipatronale. Rejetée. Conflits entre employeurs.

SUMMARY

Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), and Association des débardeurs de Bécancour (ADB), applicants, International Longshoremen's Association, Local 1846 (ILA), certified union, Compagnie d'Arrimage Trois-Rivières Ltée, J.C. Malone and Company Ltd., Les Élévateurs de Trois-Rivières, Somavrac Inc., and Quebec Ports Terminals Inc., employers, Maritime Employers' Association, employer representative, and Société du parc industriel et portuaire de Bécancour (formerly Central Quebec Industrial Park Corporation) and Comité des entreprises et opérateurs du parc industriel et portuaire de Bécancour, intervenors.

Board Files:
555-3208
555-3450

Decision no.: 967

Conflicting applications for certification (2). Ports of Trois-Rivières and Bécancour. Raid. Geographic certification. Longshoring industry. Application filed by CUPE pursuant to section 34 (multi-employer certification) of the Canada Labour Code (Part I - Industrial Relations) seeking to displace the ILA as certified bargaining agent. Allowed. Application filed by ADB pursuant to section 24 seeking to break up a multi-employer certification. Dismissed. Conflicts between employers.



Les ports de Trois-Rivières et de Bécancour sont situés l'un en face de l'autre le long du Saint-Laurent, à la hauteur des villes de Trois-Rivières et de Bécancour. En 1987, le Conseil a accueilli une demande d'accréditation fondée sur l'article 132 [maintenant article 34 de la Partie I] regroupant dans la même unité les employeurs et les employés travaillant dans les deux ports (voir Association des employeurs maritimes et Terminaux Portuaires du Québec (1987), 65 di 162; et 19 CLRBR (NS) 34 (CCRT n° 642)). La majorité des employeurs avait confié à l'Association des employeurs maritimes (AEM) le mandat de les représenter. Un employeur dissident n'a jamais reconnu l'AEM. Le Conseil avait jugé que l'AEM représentait néanmoins tous les employeurs. Aucune convention collective n'a été signée depuis 1985. En 1990, le Conseil a accrédité le SCFP pour remplacer l'AID comme agent négociateur. En avril 1992, la Cour d'appel fédérale a annulé cette décision en demandant au Conseil de réentendre l'affaire. En décembre 1991, le Parlement a modifié l'article 34 du Code.

En mai 1992, un syndicat indépendant, l'ADB, encouragé par l'employeur dissident, a présenté une demande visant à scinder l'accréditation multipatronale.

Le Conseil a procédé à une revue élaborée de l'historique des relations de travail dans cette région. Il a aussi analysé en détail le comportement des parties.

The ports of Trois-Rivières and Bécancour are located one across the other along the St. Lawrence, in the cities of the same names. In 1987, the Board had allowed an application for certification pursuant to former section 132 [now section 34 of Part I] combining in one unit the employers and employees who work in those two ports (see Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642)). The majority of the employers had appointed the Maritime Employers' Association (MEA) to represent them. A dissenting employer never recognized the MEA. The Board nonetheless determined that the MEA was the agent of all the employers. No collective agreement has been signed since 1985. In 1990, the Board certified CUPE to replace the ILA as bargaining agent. In April 1992, the Federal Court of Appeal rescinded that decision directing the Board to rehear the matter. In December 1991, Parliament amended section 34 of the Code.

In May 1992, an independent union, the ADB, encouraged by the dissenting employer to do so, filed an application seeking to break up the multi-employer certification.

The Board reviewed at length the labour relations background in this region. It also analyzed in depth the parties' actions.

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Le Conseil a conclu qu'il n'y avait pas lieu de scinder l'unité de négociation multipatronale mise en place en 1987, malgré l'opposition d'un employeur. N'ayant pas jugé habile à négocier l'unité demandée par l'ADB en vertu de l'article 24, le Conseil a rejeté la demande de celle-ci.

Le Conseil a accueilli la demande du SCFP et a ordonné aux employeurs de se choisir un représentant en conformité avec le paragraphe 34(3) du Code, tel qu'il a été modifié en décembre 1991.

The Board concluded that it was not appropriate to break up the multi-employer certification agreed upon in 1987 despite one employer's opposition. Having found the unit sought by the ADB pursuant to section 24 inappropriate, the Board dismissed the application filed by that union.

The Board allowed CUPE's application and ordered that the employers choose a representative in accordance with section 34(3) of the Code, as amended in December 1991.

Canada
Labour
Relations
Board

Conseil
canadien des
relations du
travail

Reasons for decision

Syndicat des débardeurs de
Trois-Rivières, Local 1375 (CUPE),

Association des débardeurs de
Bécancour,

applicants,

and

International Longshoremen's
Association, Local 1846,

certified union,

and

Compagnie d'Arrimage Trois-
Rivières Ltée,
J.C. Malone and Company Ltd.,
Les Élévateurs des Trois-Rivières,
Somavrac Inc.
Quebec Ports Terminals Inc.,

employers,

and

Maritime Employers' Association,

employer representative,

and

Société du parc industriel et
portuaire de Bécancour (formerly
Central Quebec Industrial Park
Corporation) and Comité des
entreprises et opérateurs du parc
industriel et portuaire de
Bécancour,

intervenors.

Board files: 555-3208
555-3450

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Yves Morin and Ms. Françoise Provost, accompanied by
Mr. Bernard Paquet, technical adviser, for the Syndicat
des débardeurs de Trois-Rivières, Local 1375 (CUPE);

Messrs. Jean Poudrier and Sylvain Lepage, accompanied by Mr. Paul Allard, for the Association des débardeurs de Bécancour;

Ms. Manon Savard and Mr. Gérard Rochon, accompanied by Ms. Lyne Perron, Labour Relations, MEA, for the Maritime Employers' Association, Somavrac Inc., J.C. Malone and Company Ltd. and Les Élévateurs des Trois-Rivières;

Mr. Luc Huppé, accompanied by Mr. Claude Desgagnés, Executive Vice-President, for Quebec Ports Terminals Inc.;

Mr. Jack Boidman, accompanied by Mr. Jean Tremblay, for the Compagnie d'Arrimage Trois-Rivières Ltée;

Mr. Yves Lebrun, accompanied by Mr. Benoît Tourangeau, for the Société du parc industriel et portuaire de Bécancour; and

Mr. Edmund E. Tobin, for the Comité des entreprises et opérateurs du parc industriel et portuaire de Bécancour.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

INTRODUCTION

In a letter dated June 12, 1992, which accompanied a certification order issued pursuant to section 34 of the Canada Labour Code (Part I - Industrial Relations), the Board allowed an application for certification filed by the Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE)

(hereinafter CUPE). In that letter, the Board stated that it reserved the right to issue reasons for its decision at a later date; these are the reasons. We are also issuing another decision today, this time appointing the Maritime Employers' Association (hereinafter the MEA) as the employer representative for the employers covered by the CUPE bargaining unit (Terminaux Portuaires du Québec Inc. et autres (1992), as yet unreported CLRB decision no. 968).

These reasons deal with two applications for certification (555-3208 and 555-3450) covering a group of longshoremen who work in the ports of Trois-Rivières and Bécancour, in Quebec. Since July 16, 1987, these longshoremen have been covered by a multi-employer certification granted under section 132 of Part V of the Canada Labour Code (now section 34 of Part I) (Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642)). The bargaining agent certified in 1987 was the International Longshoremen's Association, Local 1846 (hereinafter the ILA).

Quebec Ports Terminals Inc. (hereinafter QPT), a Bécancour employer, has always challenged the idea of grouping employers in a single unit, as well as the idea of being represented as an employer by the MEA.

In the fall of 1987, despite the opposition of QPT, the MEA was recognized by the Board in accordance with then section 132(3) as the agent of all the employers covered by the ILA certification (Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 72 di 26; and 88 CLLC 16,007 (CLRB no. 658), affirmed by the Federal Court of Appeal in Terminaux Portuaires du Québec Inc. v. Association des employeurs maritimes et al. (1988), 89 N.R. 278; and 89 CLLC 14,009, application for leave to appeal dismissed by the

Supreme Court of Canada in Terminaux Portuaires du Québec Inc. v. Association des employeurs maritimes, file no. 21092, October 20, 1988. In the order certifying the ILA issued at that time and affirmed by the courts, the MEA was designated by name as the "employer covered" by the certification. In spite of this, the ILA and the MEA have never been able to sign the collective agreement on which they had agreed. The number and complexity of the reasons why they were prevented from doing so explain the unusual length of these reasons.

These reasons explain in essence the Board's decision to retain a single bargaining unit covering both ports.

II

BACKGROUND OF THE PROCEEDINGS

The first application for certification before us (555-3208) goes back to October 4, 1990. It was filed by CUPE, and raises no issue concerning the bargaining unit found appropriate in 1987 or the multi-employer nature of the unit. In short, it is a simple raid, which was moreover not opposed by the ILA. In practice, the ILA handed everything over, bag and baggage, to CUPE. This had already happened in the port of Montréal during the same period.

In its application, CUPE stated that the MEA was the "employer covered". The MEA appeared and stated that it represented all the employers of the unit and that it did not object to CUPE's application. QPT alone challenged it.

Faced with a raid in which there were no apparent complications, the Board decided to certify CUPE, which at the time had the quasi-unanimous support of the longshoremen

on both shores. The Board found that much like in 1987, the MEA was still the choice of a majority of the employers, and granted CUPE's application on February 12, 1991. At the same time, it recognized the MEA as the employers' representative. On February 27, 1991, QPT filed an introductory notice of motion against this order under section 28 of the Federal Court Act, R.S.C., 1985, c. F-7.

In the following days, CUPE, armed with its status as bargaining agent, took charge of the unit without any objection from anyone. It then started to negotiate a collective agreement with the MEA. However, the discussions did not bear fruit, and in September 1991, the union went on strike. It struck both ports for nearly eight months, despite the efforts of the Minister of Labour, who appointed a conciliator to bring the parties together. One of the key factors in the dispute was the difficulty of getting the employers to reach an agreement between themselves.

On April 9, 1992, CUPE and the MEA finally entered into a collective agreement, based on a settlement package prepared by the conciliator. QPT, which disagreed with that proposal, immediately refused to apply the agreement in question. That brought on a new chain of proceedings, which are in fact still pending (745-4211, 725-313 and 610-126) (see page 9).

There was another development barely a week later. On April 16, 1992, the Federal Court of Appeal allowed the application for judicial review QPT had filed in February 1991.

The Court then reversed the order of February 12, 1991 certifying CUPE. It referred the matter back to the Board "to be decided by it on the basis that the application for

certification should have been made against the employers concerned" (Terminaux Portuaires Du Québec v. Canadian Union of Public Employees (1992), 92 CLLC 14,034 (F.C.A.), page 12,214). This judgment concluded that the Board had exceeded its jurisdiction by allowing CUPE's application for certification, since it was not specifically directed against all the employers concerned. Moreover, the Board had erred by not ordering those employers to appoint a new agent and by assuming that they had appointed the MEA. Only if the employers could not agree on the choice of an agent could the Board "appoint" one.

On April 21, 1992, several days after the Federal Court of Appeal judgment, the Board received from CUPE a request to amend or provide particulars on its initial application for certification, by designating the five longshoring businesses involved in the ports of Bécancour and Trois-Rivières by name as being the "employers covered" by its application.

The Board then checked as best it could, through its investigation services, the identity of all businesses operating in the longshoring industry in the ports of Trois-Rivières and Bécancour in the spring of 1992. These checks confirmed that the businesses in question were well known to the Board. They were

- (1) Compagnie d'Arrimage Trois-Rivières Ltée, hereinafter Arrimage TR,
- (2) Somavrac Inc., hereinafter Somavrac,
- (3) J.C. Malone and Company Ltd., hereinafter J.C. Malone,
- (4) Les Élévateurs des Trois-Rivières, hereinafter ETR, and
- (5) QPT.

Because the Board's investigation into CUPE's original application for certification dates back more than a year, and because the instructions given by the Court concerning an additional investigation are vague, the Registrar of the Board writes to the parties on April 22, 1992, as follows:

"On October 4, 1990 the Board received an application for certification (file 555-3208) filed by the Canadian Union of Public Employees, Local 1375 (CUPE or the applicant), pursuant to section 34 of the Canada Labour Code (Part I - Industrial Relations).

This application, as worded, sought to supplant the International Longshoremen's Association, Local 1846 (ILA), as the bargaining agent for 'all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region comprised of the ports of Trois-Rivières and Bécancour.'

The applicant identified therein the Maritime Employers' Association (MEA) as the employer. The Board sent the MEA a copy of this application on October 10, 1990. On the same day, a copy of this application was sent to Quebec Ports Terminals Inc. (QPT), which had so requested.

On October 16, 1990, QPT intervened in these proceedings by declaring itself to be an employer covered by the application and having rights and interests distinct from the MEA (letter of October 16, 1990). QPT therefore requested a copy of all correspondence and documents exchanged (letter of October 16, 1990).

The MEA, for its part, appeared in these proceedings, stating that it was acting in its capacity as 'agent of all the employers of the employees covered by the said application' (letter of November 6, 1990). The MEA had, on October 28, 1987, been appointed as agent of the employers in an order issued by the Board following the certification of the ILA by the Board on July 16, 1987, under section 34 of the Code.

On October 10, 1990, the Board also informed the MEA, CUPE and the ILA that it was assigning its senior labour relations officer, René Lacas, to conduct the investigation in the case.

Mr. Lacas investigated and filed a report with the Board on January 18, 1991. According to Mr. Lacas' report, all correspondence and documents received by the Board were sent to the MEA, CUPE, the ILA, QPT and the Société du parc industriel et portuaire de Bécancour, or to their respective solicitors. The Société du parc industriel et portuaire de Bécancour had submitted a request to intervene.

Neither the MEA nor the ILA challenged the application by CUPE on its merits, although QPT did.

On February 12, 1991 the Board certified CUPE pursuant to section 34 of the Code for the unit sought. The Board stated in that order that it found that a majority of the employers covered continued to be represented by the MEA as their agent. A copy of that order is enclosed.

The validity of that order was challenged by QPT in the Federal Court of Appeal in an application for judicial review filed on February 27, 1991 (file no. A-178-91).

On April 16, 1992, the Federal Court of Appeal delivered the following judgment, a complete copy of which is also enclosed. This judgment held:

'Accordingly, I would allow the application, reverse the decision made by the Board on February 12, 1991 and refer the matter back to the Board to be decided by it on the basis that the application for certification should have been made against the employers concerned.'

On April 21 the Board received a request from CUPE to provide particulars or amend its application to make the businesses hereinafter identified on page 5 hereof as parties to it as employers.

Moreover, in view of this Court of Appeal judgment, the undersigned, on behalf of the Board, verified the identity of all employers covered by this application, that is, the employers operating in the longshoring industry in the area covered by the application for certification.

According to our information, the longshoring businesses which are employers are as follows:

Compagnie d'Arrimage Trois-Rivières (Empire Stevedoring Co. Ltd.)

...

Somavrac Inc.

...

J.C. Malone and Company Ltd.

...

Les Élévateurs des Trois-Rivières

...

Quebec Ports Terminals Inc.

...

The Board has asked me to inform you that CUPE's application for certification covers all these employers and that it also concerns the MEA which is at present the employer representative designated in the ILA certification. The Board will therefore send a complete copy of its file to the parties who do not already have it, that is: the Compagnie d'Arrimage Trois-Rivières, Somavrac Inc., J.C. Malone & Co. Ltd. and Les

Élévateurs des Trois-Rivières. The enclosed list, which was used in the proceedings before the Federal Court of Appeal, is sent to the parties as a reference document concerning the content of the file. In addition, the following two documents are enclosed:

- *Decision of the Federal Court of Appeal dated April 16, 1992 (file no. A-178-91);*

- *Request by CUPE dated April 16, 1992."*

(Empire Stevedoring Co. Ltée et autres, April 22, 1992 (LD 1018), pages 3-6; translation, except for bargaining unit description and excerpt from Federal Court judgment)

This letter concludes with an invitation:

"Any party who wishes to appear in this matter or who has any additional argument to present, inter alia as to whether a hearing should be held, shall do so at the Board's office by May 1, 1992, with a copy to all other parties at the fax number or address indicated beside their names."

(page 6; translation)

The Board further instructed the registrar to bring these new proceedings to the attention of the MEA, in its capacity as "agent," in accordance with the Board's 1987 order, and in its capacity as "employer representative", which it acquired when Bill C-44 came into effect on December 5, 1991. We shall return to this. The Board also informed the Société du parc industriel et portuaire de Bécancour, which had sought intervenor status in the fall of 1990, of these proceedings.

At that time the Board also held emergency hearings on April 13, 14 and 15 (that is, before the Court of Appeal judgment). These hearings essentially involved the same parties, with the exception of the Association des débardeurs de Bécancour (hereinafter ADB or the Association), which had not yet been formed. They dealt with a complaint of unfair labour practice, an application for a declaration of unlawful lockout and an application to

refer a matter to arbitration (our files 745-4211, 725-313 and 610-126). CUPE had filed the two complaints after QPT refused to recognize, and accordingly to apply, the collective agreement entered into with the MEA on April 9, 1992. In addition to these three applications, CUPE filed several grievances alleging that QPT had breached the new collective agreement. This was the context in which the MEA then filed a referral with the Board, to have it decide whether there was a collective agreement, whether it was legal and what the scope of the collective agreement was. These hearings concluded on May 1, that is, after the Court judgment. The issue was then the effect of the Court of Appeal judgment on the question of whether there was a collective agreement for the period from April 9, 1992 to April 16, 1992, that is, from the time it was signed until the Court of Appeal handed down its judgment. The matter is still under deliberation before the Board.

That is where we would be were it not for a new twist which occurred shortly thereafter.

In this context, which was complicated to say the least, the ADB, a non-affiliated association, came onto the scene and on April 25, 1992 filed an application for certification (555-3450) covering the following bargaining unit:

"All employees involved in loading and unloading ships and other related duties (longshoring) employed by employers of the port of Bécancour, Quebec."

(translation; emphasis added)

Counsel for the ADB clarified the description of the unit sought by stating that it had to be read as "users" rather than "employers." In reality, it covers only QPT. In fact, as we shall see later, the longshoremen who belong to the ADB, about 13 individuals, work in Bécancour. They are

taking advantage of the rescission of CUPE's certification by the Court of Appeal to resume what is their traditional claim concerning the work done in Bécancour. They want priority for any work assigned in Bécancour. CUPE had even promised this when they joined in 1990. They say that two years later they became dissatisfied with CUPE and its stillborn collective agreement of April 1992. According to them, the agreement did not guarantee them this priority and they therefore decided to form their own association. Through the ADB, they applied to have the multi-employer unit defined in 1987 and renewed in 1991 divided. They want "their own" unit, a unit comprised of longshoremen who work full-time in Bécancour, and limited to a single employer, QPT.

Given these new circumstances, a labour relations officer with the Board again went to Trois-Rivières and Bécancour to complete his investigation into the two applications for certification. Inter alia, he personally posted the two applications at the establishments of all employers then identified. In addition, public notices were given by the Board on two occasions in the Trois-Rivières newspaper, Le Nouvelliste.

Because the applications filed by CUPE and by the ADB were related, the Board decided to consolidate them and to convene all interested parties at a hearing. These new hearings were held on May 12, 13, 14, 15 and 21, 1992, in Cap-de-la-Madeleine, Quebec.

On June 12, 1992 the Board allowed CUPE's application and dismissed the ADB's application (Compagnie d'Arrimage de Trois-Rivières et autres, June 12, 1992 (LD 1036)). The Board will now give the reasons for that decision, as it stated at the time that it would do.

III

APPEARANCES

The five employers named in CUPE's amended application for certification appeared. Three of them, Somavrac, J.C. Malone and ETR, all of Trois-Rivières, authorized the MEA and its counsel to act on their behalf, pursuant to section 6 of the Board Regulations. In their appearance they stated that the MEA is and has "at all times" been authorized to represent them in respect of CUPE's application. These employers then reiterated the position taken by the MEA on their behalf in 1990, that is, that they supported CUPE's application for certification. On the other hand, they objected to the ADB's application.

A fourth employer, Arrimage TR, also of Trois-Rivières, was represented by separate counsel, as did QPT.

Counsel for Arrimage TR was essentially content to play an observer role at the Board's hearings. In its written submissions, Arrimage TR expressed the opinion that because of the numerous disagreements between the MEA and QPT, it would perhaps be better to divide the existing unit between Trois-Rivières and Bécancour, that is, on the basis that had always been sought by QPT, and more recently by the ADB. [As we shall see later, QPT and Arrimage TR are related companies, both being subsidiaries of the Compagnie d'Arrimage du Québec. (See the Board's comments on this issue in Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra, pages 192; and 65.) We would add that this relationship had not, however, prevented Arrimage TR from supporting the MEA in the context of CUPE's original application for certification in 1990 or from approving the draft collective agreement signed on its

behalf by the MEA on April 9, 1992. Arrimage TR was also on the MEA's side in the lockout proceedings and the referral which is now under deliberation.]

IV

INTERVENTIONS

The requests

At the beginning of the hearings in May, the Board received three requests to intervene on which it gave final decisions orally, which decisions we shall recall here. One was made by the Société du parc industriel et portuaire de Bécancour, formerly known as the Central Quebec Industrial Park Corporation (hereinafter the Société); the second, by a group which is well described by its name, the Comité des entreprises et opérateurs du parc industriel de Bécancour [the committee of businesses and operators of the Bécancour industrial park] (hereinafter the Comité); and the third, by the MEA. Let us examine them.

The Société, which is a Crown corporation owned by the Government of Quebec, owns the port of Bécancour. This is not its first foray before the Board: it may be found as far back as the proceedings involving the Bécancour longshoremen go, since the Société itself was formed. In fact it has always sought to intervene, indicating when it filed its request the grounds for its intervention and its interest in the case, in accordance with the Board Regulations. It took the opportunity to explain the peculiarities of the Bécancour industrial and harbour park, and to state its reasons for opposing multi-employer certification. QPT has for years, as a result of the decision of the Société to

exclude all others, been the only longshoring business authorized to operate in the port of Bécancour.

It is important to note the date of, and to quote a passage from what the Société wrote in, its request to intervene dated December 19, 1990, which did not present any new facts.

"Further to the letter which we sent to the Board on December 14, 1990, and to the Board's reply dated December 18, the Société du parc industriel et portuaire de Bécancour (hereinafter the 'Société') files the following intervention.

1. The Société is more fully identified by its Act, chapter 42 of the Statutes of Quebec, 1990, a copy of which is attached.

2. Since 1980, the Société has participated in various proceedings and hearings concerning the labour relations relating to the longshoring activities which take place in its harbour facilities; it has had the opportunity to call witnesses and to introduce extensive evidence as to its activities and its relations with the businesses in the park, longshoring businesses and other interveners. Throughout the last 10 years, the Board has agreed to receive the written submissions of the Société and to give the Société notice of hearings and to hear its representatives and witnesses.

3. More particularly, the Société has established an exclusive relationship with the business responsible for longshoring activities in its harbour facilities, through the issuance of an exclusive access licence to that business, QPT.

4. The licence was issued following a public call for tenders, which procedure has already been explained to the Board in earlier cases.

5. On several occasions, the MEA attempted to discredit the process and the licence, but was never successful.

6. Thus for several years the Société, the businesses operating in the park and QPT have formed a community of interest with specific characteristics, in a specific geographic area, in accordance with the mandate given to the Société by the Government of Quebec.

...

10. The exclusivity of longshoring services was decided both by the Société and by the businesses for the purposes of efficiency and security of relations between the parties."

(translation; emphasis added)

It is particularly interesting to consider what the Société wrote two years later, on April 30, 1992; the reason for this will be seen later. It reiterated its first four statements, as set out above, and added the following.

"17. The Société has learned that the 13 priority longshoremen in Bécancour request that the Board recognize them as a bargaining unit.

18. The Société supports at this time, as it did in the past, a decision that would recognize the Bécancour longshoremen as a bargaining unit, because this would correspond to the economic reality of the park and the businesses which operate there, and would focus the relationship between employer and longshoreman back on local issues.

...

24. The Société submits that the Board cannot ignore the economic environment in determining the decision to be made.

...

26. As another illustration of the foregoing, we attach hereto articles from Le Nouvelliste de Trois-Rivières dated October 31 and November 5 and 28, 1991, and January 11, 1992.

27. These articles refer to the issuance by the Société of an exclusive access licence to QPT and renewal of the licence, to which CUPE objects, although this licence does not grant QPT any longshoring contract which rather are granted by the businesses in the park.

...

29. CUPE cannot obtain an access licence from the Société and does not request one, it cannot enter into a longshoring contract with the businesses in the park and it does not seek one, it does not claim to erase the MEA's accumulated deficit in Trois-Rivières, caused by guarantees of job security given at a time when maritime transport was going well, it is not trying to negotiate specific provisions of the collective agreement with QPT for the work in Bécancour, it is following a political-economic course which is unlikely to benefit it but which is clearly in favour of certain businesses which are competitors of QPT.

QPT's competitors are trying to supplant this business, which the businesses in the park wish to retain, and to which they have assigned their longshoring work for the years to come.

...

32. The Board normally exercises its powers for the benefit of workers in order to create a structure which is favourable to their relations

with the employers and accordingly 'environmental' factors should be taken into account, because these relationships do not exist in a void, and the historic, unconditional support given to certain intervenors would not be less propitious to the creation of a structure favourable to labour relations than a review of the entire situation in light of the real interests."

(translation; emphasis added)

The Comité, for its part, is an informal group of businesses established in the Société's industrial and harbour park. No business employs longshoremen. They use the services of QPT. In its request to intervene, the Comité took a position which was identical to that of the Société. In practice, it wishes to add its voice to that of the Société, in support of QPT and the ADB, for certification which would cover Bécancour exclusively.

The third request to intervene was made by the MEA which, on the other hand, challenged the two preceding requests. As we shall see later, the MEA relied on its capacity as "employer representative" under the certification in force since 1987 and reactivated by the operation of the Court of Appeal judgment. QPT strenuously objected to the MEA's request, relying, inter alia, on that Federal Court of Appeal judgment, dated April 1992 (Terminaux Portuaires Du Québec Inc. v. Canadian Union of Public Employees, supra).

Decision on the requests to intervene

These requests are governed by section 12 of the Regulations:

"12.(1) A person who has an interest in an application may file a request to intervene, which request shall be in writing and include the following information:

...

(3) *Where in the opinion of the Board an intervention would further the objectives of the Act, the Board may allow the request subject to any conditions that it considers appropriate."*

The Société and the Comité

Without repeating everything that was said at the hearing, the Board held that the interventions of the Société and the Comité would not further the objectives of the Code. It is difficult to see how the Comité, which represents what are simply indirect customers of QPT, a supplier which, moreover, they had no choice but to choose, could have a say in respect of applications for certification covering the employees of that supplier and of that suppliers' competitors. The Société, which also does not employ longshoremen, is in a similar situation to that of the Comité, although it claims to play a more important role. On the other hand, it also does not employ longshoremen.

In these circumstances, the requests could not, in our opinion, assist the Board. In its oral decision in which it denied the requests of the Société and the Comité, the Board added that if one of the parties to the proceedings considered that the Comité or the Société should be called as witnesses on an issue that was relevant to the matter before us, it could always call them on that point. We note that a representative of the Société attended the hearings, apparently right up to the moment when counsel for the Trois-Rivières employers forewarned him that he wanted to call him as a witness. Ultimately, at the request of counsel for the MEA, the Board issued a summons to appear to the general manager of the park, Pierre Clouâtre, and heard his testimony. However, counsel for the Société stated, when the general manager appeared, that the Société wished

to co-operate with the Board and that the summons to appear was quite unnecessary. We shall return to this.

The MEA

With respect to the request to intervene made by the MEA, we decided that its participation in the proceedings furthered the objectives of the Code. First, the MEA had been directly appointed by three Trois-Rivières employers as their representative, in accordance with section 6 of the Board Regulations. But there is more.

The effect of the Federal Court of Appeal judgment dated April 1992 (Terminaux Portuaires Du Québec Inc. v. Canadian Union of Public Employees, supra) was that the MEA still had status as an agent under the terms of the order issued by the Board in 1987 (see Maritime Employers' Association and Terminaux Portuaires du Québec (658), supra). In fact, the Federal Court of Appeal rescinded the 1991 order, which itself rescinded the 1987 certification order in favour of the ILA. This had the necessary implied effect of resurrecting the ILA's certification, and thus the recognition of the MEA as "agent" under section 132 (Part V of the Code) (now section 34 of Part I) (Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra). It then changed from "agent" to "employer representative" by the operation of Bill C-44 (Bill C-44, An Act to amend the Canada Labour Code (geographic certification), 3rd Sess., 34th Parl.). The MEA was therefore, at the time of the hearing, still the only "employer representative," and still is, just as the ILA continues to be the union bargaining agent, until the applications filed by CUPE and the ADB are finally determined. Simply filing an application for certification does not result in revocation of the certification in force.

In these circumstances, it would have been paradoxical, to say the least, not to authorize the MEA to intervene. The MEA is still the "employer representative" and, as such, is still subject at the very least to all duties of employers toward the ILA and, accordingly, is still authorized to act as employer within the meaning of the Code. Accordingly the MEA must, for example, comply with the duty relating to freezing terms or conditions of employment (section 24) and retains the power to bargain a collective agreement with the ILA (section 50). It would make no sense not to consider it to be an interested party in proceedings which may well terminate its status as a representative. (Some of the problems which flow from this paradox in the context of the freeze on terms or conditions of employment are illustrated in Quebec Ports Terminals Inc. (1991), as yet unreported CLRB decision no. 870, issued before the Court of Appeal judgment of April 1992 (Terminaux Portuaires Du Québec Inc. v. Canadian Union of Public Employees, supra).)

The Board therefore denied the requests of the Société and the Comité, and allowed the request of the MEA.

V

THE RELEVANT LEGISLATION

Another aspect of the complexity of this case involves the change to the relevant legislation.

When CUPE filed its application in 1990, section 34 of Part I read as follows:

- "34.(1) Where employees are employed in
- (a) the long-shoring industry, or
 - (b) such other industry in such geographic area as may be designated by regulation of the

Governor in Council on the recommendation of the Board,

the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall order that

(a) one agent be appointed by the employers of the employees in the bargaining unit to act on behalf of those employers; and

(b) the agent so appointed be appropriately authorized by the employers to discharge the duties and responsibilities of an employer under this Part."

On November 29, 1991, Parliament enacted the above-mentioned Bill C-44, which repealed section 34(3) effective December 5, and substituted the following therefor:

"34.(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,

(a) require the employers of the employees in the bargaining unit

(i) to jointly choose a representative, and

(ii) to inform the Board of their choice within the time period specified by the Board; and

(b) appoint the representative so chosen as the employer representative for those employers.

(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.

(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all

employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.

(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."

First, it will be noted that Parliament is no longer referring to the "agent," but rather to the "employer representative," and further, that the representative's authority is defined. Moreover, the new section 34(6) imposes on the employer representative appointed under section 34(3) a duty of fair representation similar to the duty imposed on a union bargaining agent under section 37 of the Code. The legislation attaches to this duty a specific remedy given to an employer which is dissatisfied with its "representative." As well, the Board is given additional remedial powers (Bill C-44, supra, section 2, amending section 97(1)(a), and section 3, amending section 99(1)). Finally, there is a transitional provision in section 4 of the Bill which is of particular interest, and which reads as follows:

"4. Agents appointed under section 34 of the Canada Labour Code, as that section read immediately before the coming into force of this Act, shall be deemed to be employer representatives appointed under that section as amended by section 1 of this Act."

It is this transitional provision to which we referred in declaring that the MEA, which was appointed as the employers' agent under the 1987 certification order (530-1293), has since December 5, 1991 been deemed to be an

"employer representative" appointed under the new scheme. We shall return later to Bill C-44, and particularly to the circumstances and objectives of the enactment of said bill. This is the legislative context in which CUPE's application was filed: filed and decided first under the former section, it is now resurrected under the new section.

The ADB application was filed under sections 24 et seq. of Part I, which remain unchanged.

The parties when invited to argue the issue of the legislation applicable to the cases before the Board unanimously acknowledged that CUPE's application had to be decided under section 34 of Part I, as amended in December 1991. The Board is also of that opinion.

VI

CONTEXT OF THE HEARINGS

The Court of Appeal did not order in April 1992 that new hearings be held in this matter, and the Board did not formally agree, in letter-decision no. 1018 (Empire Stevedoring Co. Ltée et autres, supra), to hear new evidence at the hearings which it decided to hold. Rather, it invited the parties at the outset to outline in advance the arguments they would like to make, should this occur. As well, once the issues relating to the requests to intervene and to the applicable legislation were resolved, the Board checked with the parties whether it was really necessary in the circumstances to hear further evidence.

Essentially, CUPE and the employers represented by the MEA stated that they relied on the documents already on file, which they considered to be complete. On the other hand,

the ADB and QPT proposed to present additional evidence. Finally, Arrimage TR stated that it reserved the right to call rebuttal evidence, depending on what the others did.

After considering the parties' arguments, the Board decided first to enter the evidence heard at the hearings held on April 13, 14 and 15 and May 1, 1992, relating to the two CUPE complaints and the MEA request for referral (our files 745-4211, 725-313 and 610-126) (see pages 9-10), into the file in this case. Because this evidence dealt mainly with the present labour relations situation in the ports of Bécancour and Trois-Rivières, it appeared to us to be relevant. The Board therefore provided the parties with a copy of the transcript of these hearings so that they could expand on or correct any point they considered necessary.

Second, the Board decided to allow the parties to present additional evidence that could assist it in determining the appropriateness of the proposed units. On this point, we would remind the parties of the Board policy that the party who wishes to divide an existing unit, particularly one which has recently been established, has the burden of persuading the Board of the merit of such a change. (See Canada Post Corporation (1990), 81 di 187; and 14 CLRBR (2d) 195 (CLRB no. 818), upheld by the Federal Court of Appeal in Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al., file no. A-626-90, September 12, 1991.)

The Board also instructed the parties to concentrate their evidence on what has happened since February 12, 1991, the date of the order certifying CUPE, which the Federal Court of Appeal rescinded in April 1992. We added, however, that if a party wished to go outside this framework during the hearing, it could at any time make such a request. In point of fact, all parties in turn went beyond the limits

initially established. More specifically, several witnesses alluded to the events surrounding the issuance of the certification orders in 1987 and the appointment of the MEA as agent. It is understandable that it was difficult for them to ignore these events, which in a way constituted the backdrop to these certification applications. On the other hand, we learned nothing new; the essential facts had been provided, in one way or another, in our lengthy record of decisions on Trois-Rivières and Bécancour, as we shall now see.

VII

BACKGROUND TO THE APPLICATIONS FOR CERTIFICATION

We are aware that we are repeating ourselves, but we are also concerned that we clearly situate this case in its context; we must therefore review several stages in the labour relations history of the longshoring industry in the region of the ports of Bécancour and Trois-Rivières. This background is very troubled. We shall draw it in broad strokes, for the most part, relying on the Board's reported decisions, which have fully described this history.

The initial multi-employer certification was issued under the aegis of section 132 of Part V in the port of Bécancour in 1980, relating to Local 2018 of the ILA (hereinafter Local 2018). The unit certified at that time identified three employers: Logistec Inc., Somavrac and Ampo Ltée. At the same time, however, QPT - then known as Murray Bay Marine Terminal - was also active in Bécancour. (We shall refer to Murray Bay as QPT for ease of reading.) The three businesses identified by the ILA then appointed the MEA as their agent. Consequently QPT, which was not named in the application by Local 2018, did not intervene. Once the

decision had been rendered, QPT refused to recognize both Local 2018 and the appointment of the MEA, which then both applied to the Board to clarify or amend the order of February 21, 1980, so that the certified unit would clearly cover all employers engaged in longshoring in the port of Bécancour, including QPT. While awaiting the decision of the Board, the same dispatch and job security system as applied to the longshoremen working in Trois-Rivières was applied to the 11 Bécancour longshoremen, represented by Local 2018. In Trois-Rivières, the longshoremen have been represented since 1977 by the ILA under the terms of a geographic certification (Association des employeurs maritimes, file no. 530-25, February 15, 1977).

On November 25, 1981, the Board dismissed the applications for review filed by the MEA and by Local 2018. At the same time, the Board announced its decision to rescind the order certifying Local 2018, dated February 21, 1980, within the next few weeks. While stating that it was convinced that a single unit covering all employees of all employers engaged in longshoring in the port of Bécancour was appropriate, the Board nonetheless refused to amend the certification order as requested. This decision was based on, inter alia, the fact that the points of view of QPT on its potential membership in the MEA and of its employees on being represented by Local 2018 had not been considered during the Board's investigation which had led to the certification order of February 21, 1981. The Board believed it had been misled. The Board then stated:

"... We believe that to allow the handling of goods intended for or shipped by the businesses located in the park to be excluded from the scope of the single unit would create artificial distinctions like those between the loading and unloading of coastal ships and ocean-going ships or those relating to the nature of the cargo. To distinguish between units based on the identity of the owners of the type of ships or the kind of goods will result in a multiplicity of bargaining

units and union jurisdictions, which is precisely what the provisions of section 132 are designed to prevent. If there are labour disputes associated with the renewal of collective agreements, these distinctions will simply add to the confusion, and besides contributing to it, both the Corporation and the park's tenants will be the first to pay the price. In short, the appropriate unit for the Port of Bécancour is the unit that includes all employees of all employers performing longshoring and related operations.

It is clear, in the light of the foregoing, that the Board wanted a single unit for the Port of Bécancour.

In file 555-1289, the Board was never told that Murray Bay existed and when it granted certification, it was under the impression that the only employees who were performing longshoring duties were those of the three employers named in the certificate, which employers all wanted to be represented, pursuant to subsection 132(3), by the MEA. Given this apparent unanimity and the absence of any intervention, we certified Local 2018 and, at the same time, the MEA. Even if Murray Bay had managed to intervene, the text of the application for certification makes no reference to either them or the Association; consequently, it is difficult to criticize them for their inaction. It is, however, easier to conclude otherwise as regards Local 2018 and the MEA, who now want us, in these applications, to declare that Murray Bay is covered by our order of February 21, 1980, whereas at the time, they were both in a position to indicate that Murray Bay was covered by the application for certification but made no attempt to do so. In such circumstances, the Board will not allow itself to be pressured into including Murray Bay in the existing employer association any more than it will be pressured into including its employees in the unit. Had the Board been aware of the true intentions of Local 2018 and the MEA (which they now claim they had, but which they concealed very well), it would have considered, as it is obliged to, Murray Bay's wish to be belonged to the MEA and its employees' wish to be represented by Local 2018. We now intend to remedy this injustice, to return to the situations in which the parties found themselves prior to the order of February 21, 1980 and to acknowledge the existence of Murray Bay, its employees and the Association."

(Murray Bay Marine Terminal Inc. (1981), 46 di 55 (CLRB no. 352), pages 71-72; emphasis added)

The rescission of that certificate brought about a reconciliation between the two ILA locals. As might be anticipated, a new application for certification was filed on April 19, 1982, by the "new" Local 2018 of the ILA, which had grown out of a merger between Local 2018 and the former

Local 1846 (Terminal Maritime Pointe-au-Pic (1984), 56 di 240 (CLRB no. 477), page 247). This time, the new application covered all longshoremen of all employers but only in the port of Bécancour. In short, the same ILA local wanted to have in Bécancour what it already had in Trois-Rivières. There were then nine employers in Bécancour. Several days later, the Association des employés maritimes de Pointe-au-Pic, an independent union, applied for certification in Bécancour. We would note that this association has since 1974 represented a group of employees of Murray Bay attached to QPT in the port of Pointe-au-Pic. They are also regularly called upon to travel to other ports, depending on their company's needs (Murray Bay Marine Terminal Inc. (352), supra, page 59). They are frequently referred to in our decisions and by the witnesses as the QPT "flying squad."

On May 12, 1983, the Board certified the ILA and dismissed the application filed by the flying squad. The Board ordered the nine Bécancour employers, including QPT, to appoint an agent to represent them (Murray Bay Marine Terminal Inc. (1983), 50 di 163 (CLRB no. 401), page 177).

That same day, the MEA was appointed agent by all employers, except QPT which objected to it. One week later, QPT asked the Board to review and rescind the portion of its order dealing with the appointment of the MEA. It argued that there was then only one employer in Bécancour, i.e. itself. QPT relied on an exclusive contract described as a licence for access to harbour facilities and carrying out longshoring operations, which it entered into with the Société on May 17, 1983. It added that the practical effect of that contract was to exclude all employers, except QPT, from the longshoring market in Bécancour. It concluded that it was therefore not appropriate to appoint an employer

agent (Murray Bay Marine Terminal Inc. (1983), 54 di 38 (CLRB no. 435), see pages 42-43 where the important clauses of the contract are reproduced). The MEA stated, for its part, that it had obtained its status as agent of the eight other employers before the exclusive contract was signed.

On December 7, 1983, the Board allowed the QPT application in part and stayed sine die the order issued in May 1983 directing the employers to appoint an agent. However, the Board upheld the multi-employer certification given to the ILA. It added that the union retained "the right to attempt to conclude a collective agreement with Murray Bay" (Murray Bay Marine Terminal Inc. (435), *supra*, page 48). The MEA was therefore excluded from the negotiations.

It was then the MEA's turn, at the end of December 1983, to file an application for judicial review in the Federal Court of Appeal. On April 1, 1985, the Court allowed the application on the ground that the Board had exceeded its jurisdiction by staying the employer appointment as it had done. The matter was then referred back to the Board and decided by another panel. That panel then amended the order of May 12, 1983, this time removing the names of all employers, except QPT, from the list of employers covered by the certification (Murray Bay Marine Terminal Inc., file no. 530-977, June 25, 1985). The MEA, as might be surmised, once again applied to the Federal Court of Appeal to quash the decision of the Board. However, it withdrew its application before it was heard, several years later, on December 9, 1988; the remedy had undoubtedly become moot as a result of subsequent events.

While the Bécancour employers were quarrelling before the Board and the Federal Court of Appeal, the ILA, which was unable to sign a collective agreement, was also experiencing

its own setbacks. The dozen longshoremen attached to the QPT operation, then known as Terminal Maritime Pointe-aux-Pic, were still extremely dissatisfied with the dispatch system in the port of Bécancour. In addition, it had then been almost three years since the certification proceedings had been started and no collective agreement was in sight. They therefore undertook to supplant, to raid, the ILA. Local 2018, which had merged several years before with Local 1846 and which was believed to be dead, was resurrected from its ashes. On March 6, 1984, it filed an application for certification under section 24 of Part I seeking to represent these 12 QPT longshoremen. This application was on many points similar to the ADB's current application. Norman Quigley, who is in fact the international vice-president of the ILA, was at that time the main architect of raiding between ILA locals. He was assisted by Michel Levasseur, the president of Local 2018, and now the president of the ADB.

In a decision dated August 17, 1984, the Board reviewed the multiple and conflicting roles played by Mr. Quigley in this matter. As if it were nothing, he wore the hat of the vice-president of Local 1846, trustee of that Local, then international vice-president (Atlantic Region) of the ILA, and finally advisor to Local 2018. The following remarks, which were made at the time, shed some light on the state of relations between the longshoremen on the two shores:

"On February 5, 1984 Mr. Quigley was removed from his position as Vice-president of Local 1846.

On February 21, 1984 Mr. Quigley took steps to have Local 1846 put into union trusteeship by the I.L.A., alleging that Local 1846 misrepresented the longshoremen at Bécancour. Mr. Quigley's request for union trusteeship by the I.L.A. was granted on the basis of his written representations. Mr. Quigley himself was named trustee of Local 1846 with full authority. At the same time the I.L.A. began an investigation into the situation within Local 1846.

On March 6, Mr. Quigley, in his capacity as trustee of Local 1846, signed Local 2018's application to supplant Local 1846.

On March 13, an I.L.A. committee of the highest authority investigated at Trois-Rivières and found that the reasons underlying the decision to impose trusteeship were essentially groundless. Significantly, Mr. Quigley then withdrew his accusations to the effect that Local 1846 had misrepresented the Bécancour members. The I.L.A. committee decided at that same time that:

1. elections would be held on April 9, thus ending the trusteeship;
2. Mr. Quigley could no longer aspire to any position within Local 1846; and
3. Mr. Quigley would stay on as trustee until April 9 for the sole purpose of dealing with day to day administrative matters.

Despite this, a week later on March 22, 1984, the Board received Local 1846's first official reply to the application by Local 2018. Mr. Quigley, the trustee, declared that Local 1846 did not wish to intervene and asked the Board to act quickly in view of the fact that the Bécancour employees had been without a collective agreement since May 12, 1983."

(Terminal Maritime Pointe-au-Pic (477), *supra*, pages 244-245)

In short, the trustee of Local 1846, and sponsor of Local 2018, "consented" to the raid. Tension mounted in the ports and violence erupted.

The Board was aware of the internal quarrels which divided Local 1846, particularly in respect of dispatching workers between Trois-Rivières and Bécancour. These quarrels derived from the absence of fair rules for dispatching workers and, as a result, a union structure marred by favouritism and nepotism. Accordingly, aware of the employees' dissatisfaction and manipulation, the Board concluded that Local 2018's application for certification was not motivated by the best interests of the employees.

The Board closed by reminding all parties that ILA Local 1846 continued to be the only union authorized to represent

the Bécancour longshoremen in dealing with QPT (see Terminal Maritime Pointe-au-Pic (477), supra, page 248).

However, it was not until a year later, on October 8, 1985, in what were again very peculiar circumstances, that Terminal Maritime, which had become QPT, and ILA Local 1846 finally signed a collective agreement. It was for a term of five years and, it should be noted, it included a me-too clause for wages, dependent on what was to be negotiated in the port of Trois-Rivières. This clause provided for automatic adjustment of the hourly rate in Bécancour to what was ultimately negotiated between the same union and the MEA in Trois-Rivières. It should also be noted that the collective agreement then in force in Trois-Rivières expired on December 31, 1985 (with respect to the context in which the QPT-ILA agreement was signed in 1985, see Maritime Employers' Association and Terminaux Portuaires du Québec (642), pages 194 et seq.; and 67 et seq.).

What were the circumstances in which it was signed? In the hours leading up to the signing, the ILA, being quite careful to hide this from QPT, filed an application for certification pursuant to section 132 of Part V in order to consolidate in one unit the longshoremen working in Trois-Rivières and in Bécancour. That application was heard by the Board in the spring of 1986. At the time of the hearings, negotiations were still ongoing on the Trois-Rivières side.

On July 16, 1987, the Board issued its decision (Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra). It found that the conditions in which section 132 applies had been met. First, the ports of Trois-Rivières and Bécancour constitute a single geographic area. Second, the professional longshoremen work in both

Trois-Rivières and Bécancour and, accordingly, they constitute a single labour pool. The Board found, *inter alia*, that QPT, which was strenuously opposed to the application, nonetheless benefited considerably from the presence of this single labour pool and 'could not have fulfilled its commitments without access to this specialized labour force.

In its determination of the appropriateness for collective bargaining of the unit sought, the Board recalled the traditional criteria set out in National Bank of Canada (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRB no. 542), pages 137-138; 298-299; and 14,312 (community of interest, extent of union organization, employee wishes, bargaining history, employer's structure and viability of the unit). These criteria were again recalled in this case, specifically by those who supported the ADB's position.

In referring to these criteria, the Board was careful to weigh them in light of the unique nature of the longshoring industry within our jurisdiction.

The Board then noted the intermittent nature of the arrival of ships and thus of the longshoring activities to be carried out; the consequences for the longshoremen of working for a multitude of employers; the need for the employers to have skilled workers, readily accessible and fairly dispatched; and, finally, the desirability in the St. Lawrence region of having a job security and dispatch system designed to provide a continually better-trained labour force. Naturally, the Board added, the counterpart of establishing such systems is the necessary banding of employers. At that time, the evidence showed that only the Trois-Rivières employers, who were all MEA members, had

funded such a system and that QPT had never borne the costs, although it enjoyed the benefits.

After examining all these factors and recalling the purpose of geographic certification, which is to ensure industrial peace where there are numerous employers, the Board allowed the application, as follows:

"In conclusion, we find in the present case that a common labour force belonging to the same union serves the longshoring companies, which number more than two, operating in the geographic area formed by the ports of Bécancour and Trois-Rivières and that the situation has existed for a number of years. We find that the ports of Bécancour and Trois-Rivières constitute an economic area within the meaning of the Code. In addition, a glance at the documents filed by the Corporation is sufficient to convince us that its port activities extend to the north shore, just as a glance at the historic role of the port of Trois-Rivières is sufficient to establish that its activities extend in turn to the south shore. This is especially true if we consider the fact that the two shores are now linked by a modern bridge.

Furthermore, the fact that TPQ and the union signed a collective agreement accompanied by a trailer cause tied to the negotiations for Trois-Rivières, also serves as clear illustration of the fact that the economic conditions of both are, in the eye of the parties themselves, interchangeable.

In terms of industrial peace, it does not seem healthy for strikes or lockouts to occur on one shore when the resulting working conditions affect both. Nor does it seem healthy, in our view, to encourage this type of bidding war when it occurs within what is clearly the same area and concerns the same individuals.

It is precisely this type of situation that led to the conflicts which, for the most part, have now been eliminated from the St. Lawrence. Any recurrence of such conflict must be prevented. The seeds of such a situation contained in the few cases that we have heard (including, among others, Terminal Maritime Pointe-au-Pic, supra [CLRb no. 477]) were sufficient to prompt us to act.

We find that, in these circumstances, the assignment of longshoremen from Trois-Rivières to Bécancour is causing serious difficulties for the longshoremen, the MEA and TPQ, not to mention the fact that it is endangering the job security plan covering the longshoremen at Trois-Rivières. Financially, TPQ is emerging from these difficulties unscathed while benefiting indirectly from the plan. It bears no part of

the cost of the plan, which has allowed for the creation and development of a stable, skilled, available work force in the vicinity of the port facilities where it operates and from which it supplements its own work force. We conclude that, if the parties decide to centralize the assignment system, the fragile industrial peace that exists in the ports of Bécancour and Trois-Rivières will be reinforced."

(Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra, pages 205-206; and 78-79)

That was on July 16, 1987. In the same breath, the Board ordered the employers to appoint an agent pursuant to section 132(3)(a), then in force.

On July 27, 1987, QPT applied to the Federal Court of Appeal to review the Board's order, under section 28(1)(a) of the Federal Court Act. On September 3, 1987, QPT informed the Board that it was legally unable to appoint an agent and that it reserved the right to contest any appointment made without its participation. On September 4, in order to ensure that no agent would be appointed, QPT asked the Court to stay the implementation of the Board's decision until the Court handed down its final judgment on the merits of the application for judicial review.

At the same time, the MEA filed documents with the Board that established that, with the exception of QPT, all employers, including Arrimage TR, the parent company of QPT operating in Trois-Rivières, had appointed the MEA as their agent. It asked the Board to declare it to be the agent of all the employers.

On September 18, 1987, the Federal Court of Appeal refused to stay the Board's certification order (Terminaux Portuaires du Québec Inc. v. Association des employeurs maritimes et al., supra).

On September 30, the union, which had been waiting for nearly three months to learn the identity of the management representative, asked the Board to file its July 16 order in the Court of Appeal pursuant to the present section 23 of the Code in order to make QPT appoint an agent.

On October 28, 1987, the Board dealt with the union's request. The Board held that filing its order in the Federal Court would serve no useful purpose, and dismissed the ILA's request. On the other hand, after noting that six of the seven employers involved had appointed the MEA, the Board applied the rule of plurality to break the deadlock and found that the MEA was thereby the agent of all the employers. The Board then issued an order confirming this appointment, in which it enjoined all employers engaged in longshoring in this region, without exception, to give the MEA the powers set out in section 132(3)(b) of the Code (Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 72 di 26; and 88 CLLC 16,007 (CLRB no. 658)). QPT once again asked the Federal Court of Appeal to quash this new decision of the Board.

On August 11, 1988, the Federal Court of Appeal dismissed both applications for judicial review made by QPT. In the same breath it confirmed the two Board orders, the first dealing with the actual certification of the union and the second dealing with the appointment of the MEA (Terminaux Portuaires du Québec Inc. v. Association des employeurs maritimes et al., supra). QPT then sought unsuccessfully to have the Supreme Court of Canada intervene. That Court denied leave to appeal on October 20, 1988 (file no. 21092, October 20, 1988).

Three years had passed since the ILA filed its application, and 15 months since it was certified on July 16, 1987. It

is unnecessary to point out that the repeated proceedings and the uncertainty surrounding the identity of the employers' agent brought any serious collective bargaining to a standstill. During this entire time, that is, since December 31, 1985, the longshoremen and their employers, at least those of Trois-Rivières, were without a collective agreement. For its part, QPT was simply applying the five-year collective agreement entered into in October 1985.

Following the Court of Appeal judgment, more serious negotiations were carried out by the ILA and the MEA. QPT, however, did not give in, despite its failures in the Court of Appeal. Given that signing of a collective agreement between the ILA and the MEA was imminent in the summer of 1988, QPT initiated proceedings for an injunction in August 1988 in the Quebec Superior Court. QPT asked the Court to prohibit the MEA, the "agent" appointed under section 132 then in force, from signing any collective agreement with the ILA without the prior consent of QPT. In essence, it based its application on the concept of "mandate" in civil law. It argued that if the MEA was an "agent" as the former section 132 said, it could not then bind QPT, its principal or mandator, without its agreement. An interlocutory injunction was issued on November 9, 1988, followed by a permanent injunction on February 1, 1990 (Terminaux portuaires du Québec Inc. c. Association des employeurs maritimes, no. 500-05-009311-885, November 9, 1988 (S.C. Que.)). (See Quebec Ports Terminals Inc. (870), *supra*.) This last injunction was then appealed to the Quebec Court of Appeal by the MEA. It is still pending (file no. 500-09-000275-909).

The agreement was not signed and was never to be.

The Trois-Rivières longshoremen had been waiting for almost five years for their collective agreement to be renewed. The orders of the Quebec Superior Court had made it practically impossible to sign a collective agreement, in view of the state of relations between the MEA and QPT. Even the agreement in force in Bécancour was on the point of expiring and QPT no longer had the authority to renew it alone. There was a deadlock on both shores.

This is the context, chaotic and uncertain to say the least, in which the longshoremen on both shores then resigned from the ILA and almost unanimously joined CUPE in the summer of 1990. On October 4, 1990, CUPE applied for certification in order to supplant the ILA. We have now come to the CUPE application. As we know, things did not stop there.

VIII

CONTEMPORARY EVENTS

SURROUNDING THE PRESENT APPLICATIONS FOR CERTIFICATION

The CUPE application was filed on October 4, 1990. It has only one purpose: to supplant the ILA. The MEA, which appeared for the employers and stated that it represented a majority of them, did not challenge it. Since then, we have seen that a majority of the employers have confirmed that the MEA is representing them and has always represented them in this matter.

The day after CUPE filed its application for certification, QPT acted; QPT, which challenged the application, appeared and requested that all documents be transmitted to it, which was done. In January 1991, while the investigation in the file was still being conducted, QPT filed an application under section 24(4) of the Code. It sought permission from

the Board to alter the wages of its longshoremen, which wages, it stated, had not been changed for four years. It accused the MEA of having prevented it from bargaining new terms or conditions of employment with its employees. On April 24, 1991, the Board denied this request, finding it to be groundless since it had certified CUPE and the MEA in February (Quebec Ports Terminals Inc. (870), supra).

In the fall of 1991 CUPE, which had been certified since February 12, 1991, faced with the deadlock in the negotiations, went on strike. The deadlock was in fact partially due to the effect of the injunctions issued by the Superior Court, which gave each of the five employers members of the unit a veto right. Thus, in order to enter into a collective agreement, CUPE had to agree formally with the MEA, the appointed "agent" and the only agent appropriate for collective bargaining under the Code. It then had to rely on the good will of the five employers individually to agree to what had been negotiated with the MEA; unless the reverse were true! In short, there was quite a round of musical chairs among the management representatives! If we want a clear idea of all the implications of this situation, we need only imagine this happening in the ports of Montréal or of Vancouver, where there are a dozen employers grouped in a single unit.

When a strike occurs in these circumstances, we should not be surprised to find that the situation deteriorates, and this is what happened on both shores. The Superior Court again issued injunctions to restore calm and to put an end to the obstruction.

On November 28, the Minister of Labour tabled the above-mentioned Bill C-44. The situation in Trois-Rivières and Bécancour had lasted long enough, and it was necessary to

"... bring to an end a strike that has been going on for several months now. In that sense, yes, there is some urgency."

(Canada, House of Commons, Official Report (Hansard), 3rd Sess., 34th Parl., November 28, 1991 (Hon. Albert Cooper), page 5476)

The next day, the government and the official opposition agreed to expedite the bill. The government and the Minister of Labour gave the task of presenting the Bill for second reading to the Parliamentary Secretary to the Deputy Prime Minister, the member for Trois-Rivières. In order to understand properly the circumstances in which it was presented, we shall quote his comments at length, for the specific purpose of clarifying the circumstances in which the bill was presented:

"As you may well imagine, Madam Speaker, it is a truly exceptional occasion when the member for Trois-Rivières is given this opportunity to ensure that one of the laws of Canada is amended to deal with a problem that relates specifically to the riding of Trois-Rivières.

I would like to start by thanking the Minister of Labour and his officials, who did an excellent job. I would also like to mention the Leader of the Opposition, the Leader of the New Democratic Party and their labour critics, all of whom were instrumental in making it possible for us to proceed as soon as the bill was ready and on relatively short notice, to deal with an unpardonable situation, both in our legislation and in the lives of the longshoremen of Trois-Rivières.

Perhaps I may also give a short summary of this case which I have been working on for more two months [sic], a case that is truly incredible, Madam Speaker, and I am sure you will agree.

Section 34, which the House is being asked to amend this morning, was adopted in 1973. The collective agreement of the longshoremen of Trois-Rivières expired at the end of 1985. Since that time, Madam Speaker, the longshoremen of Trois-Rivières have been without a collective agreement, which means they have had no wage increases and no increases in terms of their pension fund. They have had nothing since 1985, and they have been very patient. They managed to get geographic certification so that people working in Trois-Rivières, both in the port of Trois-Rivières and the port of Bécancour, could at last officially negotiate as one unit with the Maritime Employers Association.

The employees, or should I say longshoremen, who work in Trois-Rivières and those who work in Bécancour are both covered by the same certification.

The spirit of clause 34 was that, whether in Trois-Rivières harbour, in Bécancourt [sic] harbour or elsewhere, a marine employer was required to appoint a representative to bargain with the legitimate local union. For some years now, Madam Speaker, there has been a running strife between marine employers in Trois-Rivières and Bécancourt [sic] harbours resulting in proceedings after proceedings. They went to the Superior Court, the Federal Court, to all of them. They asked for injunctions and everything else. Meanwhile, the employees, the dockers in Trois-Rivières and Bécancourt [sic], have no one to talk to across the bargaining table to reach a collective agreement. This is not about the employer and the employees disagreeing on the terms of the agreement, but about employees not even having a management representative to discuss their working conditions with. That is what this is about. The intent of clause 34, Madam Speaker, was not to allow employers to fight among themselves and not to settle with the employees across the table.

This explains the significance of this bill and why it is important that it be passed quickly. The dockers have run out of patience and are now on strike. They have been in a legal strike position for a year I think, but they only went on strike a couple of months ago, and rightly so. This is the only pressure tactics [sic] left to them to make their employers understand that they have to stop fighting among themselves and sit down and talk. You realize that once the legislation is passed forcing the employers to appoint a representative to bargain with the dockers, this will provide, to the employers at least, a way to solve the problem between these two harbours.

With your permission, Madam Speaker, I would like to read into the record of the House of Commons, the legal text to stress the importance of the Code and the spirit that had motivated those who drafted it originally, spirit which, unfortunately, as we can see today, was lost.

The proposed amendments provide that, when the Canadian Labour Relations Board [sic] certifies a local trade union, it may appoint an employer representative of its own choosing if the employer does not do it himself within the time frame specified by the Board. The representative thus named is deemed to be the employer of all the employees in the bargaining unit for the purposes of Part I of the Code and he is invested by law with all the powers needed to perform the duties and obligations of an employer, including - and that is important - the power to conclude a collective agreement.

The amendments being considered will give the Canada Labour Relations Board the authority, once geographic certification is granted, to hear and

decide any question arising from the application of section 34 and in particular concerning the selection and designation of a management representative.

Under the bill, the management representative is required to represent fairly the employers on whose behalf he acts. This obligation is similar to the one that unions have under section 37 towards employees in the bargaining unit.

If an employer believes that the management representative acted in an arbitrary or discriminatory way or in bad faith in the performance of his duties and responsibilities, he can complain to the CLRB. In case of improper representation, the CLRB can order the management representative to perform his duties properly or make any order that it sees fit to correct the infraction.

Madam Speaker, this provision imposing a duty of fair representation on the management representative protects the interests of individual employers operating in the ports covered by the geographic certification and at the same time respects the integrity of a regime that has contributed greatly to stable labour relations in the docking industry since it was introduced in 1973.

Under the transitional provisions, the agents appointed pursuant to the provisions of the present section 34 will be deemed to be the designated management representatives in accordance with the provisions of this bill as of the date that it takes effect.

You will understand, Madam Speaker, that these transitional provisions ensure the continuity of geographic certification in ports across the country and will, I hope, enable the parties in the ports of Trois-Rivières and Bécancour to settle the conflict that has gone on, as I said, for six years because no collective agreement has been signed.

Madam Speaker, the purpose of the law is simply to correct the defective wording identified by the courts, by clarifying the scope of section 34, as I pointed out, which had been considered by Parliament when it passed the law in 1973. The proposed changes will fully implement the geographic certification regime.

I will conclude, Madam Speaker, by asking the opposition parties to continue the excellent cooperation that they have given us for the past two days so that the employees, the dockers in the ports of Trois-Rivières and Bécancour, will have what any employee is entitled to, namely an employer with whom to negotiate a proper collective agreement."

(Official Report (Hansard), supra, November 29, 1991 (Hon. Pierre H. Vincent), pages 5548-5549)

This point of view was shared by the spokesperson for the official opposition:

"... As a matter of fact, I would venture to say that it is amazing there has not been a strike well before this."

(Official Report (Hansard), supra (Hon. Don Boudria), page 5550)

Later, a member added that the bill was designed to counter the paralysing effect of injunctions issued by the Quebec Superior Court:

"... We are dealing with legislation which basically puts in place a mechanism to ensure that employers get together and, through their employer's [sic] association, actually negotiate with the employees affected.

Under the present provisions of the Canada Labour Code there is a procedure for the employers to get together and do just this. However, in this case this legislation deals with a situation in which one of the employer groups has gone through the court system and received an injunction which prevents the employer's [sic] association from signing a collective agreement with its workers."

(Official Report (Hansard), supra (Hon. Rod Murphy), page 5550)

As to the need for legislation, the bill's sponsor again stated:

"... [My colleague] should understand that we are trying to set up a system that we believe Parliament had already set up in 1973. Because of the interpretation given to section 34 over the years, we can see today that the spirit of the legislation passed in 1973 is not being followed by the courts. These amendments have the effect of clearly reaffirming what Parliament intended in 1973. I must admit to my colleague that the riding of Trois-Rivières has made history in this, since it is the first time that such a situation has occurred [sic] in Canada, with a legal tangle where the employers are fighting each other while the employees wait patiently.

...

... As we speak, the four marine employers in the Port of Trois-Rivières get along well and the one in the Port of Bécancour does not get along with the other four. Thanks to the employer in

Bécancour, the only one there, we are bringing in this legislation. ..."

(Official Report (Hansard), supra (Hon. Pierre H. Vincent), page 5553; emphasis added)

The Commons unanimously passed Bill C-44 in a few days. The Senate did the same on December 4, 1991, and royal assent was given the next day.

The parties pursued their negotiations during the strike. On April 9, 1992, CUPE and the MEA, armed with the authority they believed they had under the amended provisions of the Code, signed a collective agreement, believing that this would end the nearly eight-month long dispute.

In the hours following the signature of the agreement, QPT, which did not recognize the new agreement, wrote to its "13" Bécancour longshoremen and to the 80 Trois-Rivières longshoremen who worked for it. It informed them that it did not intend complying with this agreement and invited them to do the same if they wished to work in Bécancour. QPT, it will be remembered, still disputed the legality of the certification of February 1991 and the appointment of the MEA to represent it. At the same time, it announced that it was unilaterally increasing its contribution to the pension fund and the basic hourly wage, which rose to \$21, or precisely the amount negotiated by CUPE and the MEA in the agreement QPT had denounced. However, it did not intend paying certain bonuses, which it considered to be excessive. With respect to dispatching workers, it did not intend using the integrated system that was established in the agreement to serve both shores.

For a long time, such a dispatch system had already been centrally administered by the MEA for all Trois-Rivières employers. The issue was to expand the system to cover

Bécancour. Under this system, the longshoremen would now be dispatched to both shores, based on the individual needs of the employers, and according to specific rules. It was designed to balance the gains made by the longshoremen as a whole, while treating the employers fairly in terms of access to the labour force. At the same time, there were provisions designed to regulate priority dispatch to Bécancour, a subject dear to the hearts of the 13 Bécancour longshoremen. In short, these provisions, and other similar provisions for Trois-Rivières, were designed to respond to the concerns of the Bécancour longshoremen, who were afraid they would lose their dispatch priority, with all the benefits attached thereto.

Following QPT's decision to go its own way, the situation quickly deteriorated. The same longshoremen could be dispatched at the same time to two different employers, on different conditions of employment! CUPE filed a series of grievances to make QPT comply with the new collective agreement.

This was the context in which the MEA filed a request for a referral under section 65 of the Code, to have the legality and scope of the agreement decided (page 6 et seq.). The MEA sent a copy of its request for a referral to QPT, without, however, formally naming QPT as a party. At the same time, two CUPE complaints, one of which concerned a lockout, were brought both against the MEA, the official representative of all the employers, and against QPT individually. The Board then convened all these parties at emergency hearings held on April 13, 1992 at Trois-Rivières. All of them were present or represented.

The Board was careful to notify QPT formally of the request for a referral under section 65, the MEA not having formally

named it as a party to these proceedings. QPT chose not to intervene, or even to appear. In other words, according to the file, by remaining silent QPT was not present in this case, as if the referral did not concern it.

The hearing convened in April dealt both with the complaints and with the referral. When counsel for QPT was asked why QPT decided not to intervene in the referral which dealt with the legality of the new collective agreement, he replied, in essence, that the proceedings to determine whether or not there was an agreement between the MEA and CUPE did not concern his client! Accordingly, he suggested, the Board's decision could not be binding on QPT and it was therefore pointless to appear. At the same time, the Board learned, from counsel for another party, that QPT had, however, initiated proceedings in the Quebec Superior Court for a declaratory judgment for the precise purpose of resolving the issue of the legality of the collective agreement between CUPE and the MEA!

Recalling QPT's absence during the initial certification proceedings concerning the ILA in 1980 and the rescission of the certification which had resulted from those proceedings (Murray Bay Marine Terminal Inc. (352), supra), the Board decided to add QPT as interested party in the referral proceedings, despite its objections.

Several days later, the Federal Court of Appeal rescinded the certification granted to CUPE in February 1991 (Terminaux Portuaires Du Québec Inc. v. Canadian Union of Public Employees, supra). The employers on both shores immediately stopped paying CUPE the union dues deducted from wages. The MEA declared that it would hold this money in trust until there was a final decision. Initially, QPT did the same thing.

This is the context in which the ADB was formed. The 13 Bécancour longshoremen who were working almost exclusively for QPT did not like the collective agreement of April 9, which had been denounced by QPT, particularly with respect to dispatching. They had discussed their dissatisfaction and confusion with their boss at QPT, Captain Desgagnés. Did they know that the judgment handed down by the Court of Appeal several days before had killed CUPE's certification? In essence, he simply suggested what he had been saying to them for years, that they had been had, and that they should get certified on their own.

They did not really know who to contact. No matter: Mr. Desgagnés graciously provided them with a list of law firms who could help them, including the firm which is representing them today. The idea of a separate certification for the 13 rapidly gained ground. The group first discussed, with a representative of the ILA, the possibility of the ILA returning to Bécancour. They talked about reviving Local 2018, or an equivalent. After consulting its solicitors, the ILA declined the offer and withdrew.

The Bécancour group then consulted one of the law firms suggested by Mr. Desgagnés. Preliminary meetings were held in Bécancour between the longshoremen and the lawyers in the next few days. The meetings went on with the full knowledge of QPT, in the longshoremen's room at QPT. The lawyers asked for a retainer of \$15,000. The Bécancour longshoremen had only just come off an eight-month strike! Nonetheless, two or three of them were able to get the money requested together in a hurry. Membership cards were quickly signed among the group. The ADB thus constituted filed its application for certification on April 25, 1992.

Having no funds, the ADB again officially called on the employer. The new association immediately obtained QPT's support. Upon the simple presentation of a written request from the ADB president scrawled on a scrap of paper, Mr. Desgagnés agreed to deduct union dues immediately on behalf of the ADB. QPT was not in arrears and even agreed to turn the dues over on the spot to the ADB. These union dues amount to 2% of the earnings of everyone who works in Bécancour, and not only the dozen members of ADB.

IX

LONGSHORING ACTIVITIES IN THE PORTS OF TROIS-RIVIÈRES AND BÉCANCOUR

An important portion of the documents introduced in evidence and the testimony given at the hearings dealt with the tonnage handled, the division of work between the Trois-Rivières longshoremen and their Bécancour colleagues, and the integration of these two groups of employees. Following are some points from this voluminous body of evidence that we used in our analysis of the issue of the appropriateness of the bargaining units sought by CUPE and the ADB.

The records of the longshoremen's hours of work introduced by both the MEA and QPT, covering the relevant period, indicate that out of the 130 longshoremen generally registered on both shores, 13 worked exclusively in Bécancour. These are the 13 longshoremen who belong to the ADB. Forty-three longshoremen work exclusively in Trois-Rivières. The others, a clear majority, work in both ports. This group does 25% of its work in Bécancour, overall, and the rest in Trois-Rivières.

The 13 Bécancour longshoremen have each worked an average of 2 000 hours per year, since 1987; thus we are talking about a total of about 26 000 hours for the group. In 1987, that represented nearly 65% of the total hours of longshoring done in Bécancour, which at that time was 40 000 hours. The volume of cargo has increased each year since then, and the total hours of longshoring in Bécancour rose to 58 000 in 1990 (the last complete year for which data are available; see exhibit 73 filed with the Board). It follows that more than half of the longshoring work done in the port of Bécancour since 1990 was done by Trois-Rivières longshoremen. This represents twice the number of hours compared to 1987.

If we examine the total wages paid to Bécancour longshoremen, we find that when the first application for regional certification was filed in 1985, the wages of the 13 Bécancour longshoremen represented about 62% of all wages paid in Bécancour. In 1990, this proportion fell to 51%.

Fatally, the labour force needs in the port of Bécancour are continuing to grow, and a steady increase is foreseeable in the coming years. The general manager of the Société confirmed, inter alia, that the mandate of the Bécancour industrial park has not changed since 1987. The park's mandate is regional, and extends to both shores. He also stated that the port of Bécancour is being used only to half capacity. According to him, increases in tonnage of the order of 10% are foreseen for the next few years.

In terms of vocational training, some Trois-Rivières longshoremen have been trained specifically to operate machinery which is exclusive to Bécancour. There is no doubt that Bécancour's needs will require more and more resources from outside the small Bécancour group.

From 1987 to October 20, 1990, the 13 Bécancour longshoremen worked a total of 130 000 hours. Those from Trois-Rivières, excluding casual workers, did nearly 75 000 hours, and the relevant curve is rising.

In short, far from decreasing, as contended by the ADB and QPT, the integration of the groups of professional longshoremen serving the two ports, which the Board had already noted in 1987, has rather become more pronounced over the years. QPT and the ADB claim that the trend has reversed since April 1992. It would be inaccurate to speak of a trend when the slowdown observed is clearly linked to the CUPE strike which extended into the first three months of 1992. Moreover, the percentage of hours worked by the ADB 13 after the signing of the collective agreement denounced by QPT appears to be artificial, and in any event not significant.

Unlike the port of Bécancour, the port of Trois-Rivières has experienced a decrease in tonnage and hours of longshoring work since 1989: it required 72 000 hours of work in 1987, and 79 000 in 1988, but only 60 000 in 1990, to handle the tonnage received.

A good portion of the evidence also dealt with the famous QPT exclusivity contract, its exclusive licence for access to harbour facilities and performance of longshoring activities in Bécancour. Under this licence, which was issued by the Société in 1985 in the circumstances we have seen, QPT is the only business that may engage in longshoring in Bécancour. The written briefs submitted by QPT, the Société and the Comité confirmed that this exclusivity licence was still in place. The testimony of the manager of the Société, Mr. Clouâtre, established that this has not been the case since the end of 1991.

Mr. Clouâtre informed us that without calling for tenders, but after consulting the users of the industrial park, the Société had initially renewed QPT's exclusive licence on October 9, 1991, for a period of five years. QPT was informed of that decision by Mr. Clouâtre within a few days. However, the resolution to issue this new exclusive licence was unanimously rescinded by the board of directors of the Société at its meeting on December 20, 1991. Mr. Clouâtre testified that he had never officially informed QPT of this second decision. Thus, the Société officially terminated QPT's exclusive contract without telling those concerned. The general manager explained that the decision to cancel the exclusive licence had been made reluctantly, on the urging of the Quebec Minister of Industry and Trade, who was the minister responsible under the constituent statute of the Société. According to Mr. Clouâtre, the Minister did this on the recommendation of the legal services of the Government of Quebec. (The Board allowed an objection to the introduction of these legal opinions.)

When asked why the Société had not officially informed QPT of the resolution to rescind the exclusive licence, Mr. Clouâtre stated that no one had asked him to do so. On the contrary, he had been asked rather to look for alternatives, which he was still doing at the time the hearing was held. Moreover, the Société was still hoping to be able to convince the Minister that the legal opinions on which his decision was based were incorrect.

In point of fact, the exclusive licence which gave QPT a longshoring monopoly in Bécancour no longer exists. The practice alone remains, for an indefinite time.

X

THE ARGUMENTS

QPT and the ADB claimed that the case law on dividing a unit is not relevant in this case. Moreover, they argued, the evidence showed that the exceptional scheme provided in section 34 did not achieve any industrial peace in Bécancour or Trois-Rivières. In their opinion, the evidence showed a total absence of any community of interest between the employers and employees on the two shores, whence the necessity to release them from the straightjacket of section 34.

According to QPT, the factors on which the Board relied in its 1987 decision no longer reflect reality. QPT added that the Board cannot ignore the tensions existing between the employers on the two shores when section 34 is applied. In QPT's submissions, the fact that these employers apparently will not agree on the choice of an employer representative militates against establishing a multi-employer unit covering both shores. In the submissions of the ADB and QPT, a separate unit should be created for Bécancour, and according to the ADB, since there is only one employer in Bécancour, section 24 of the Code should apply.

Arrimage TR did not produce any evidence. It limited its argument to an invitation to divide the two shores "if in fact [it is] the only practical means toward achieving peaceful industrial relations."

All the other Trois-Rivières employers, as well as CUPE, argued that the facts in evidence show the need to preserve the current bargaining unit and to permit all businesses to have access to the pool of longshoremen serving both shores. These parties emphasized the similarity between the present

situation and the situation that led to the Board's certification of the ILA in 1987 (Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra). In their eyes, nothing justifies dividing the geographic unit covering the longshoremen working on both shores. With respect to the arguments made by QPT concerning industrial peace, the union referred QPT to the clean hands theory, and criticized it for having done everything it could precisely to undermine the establishment of such peace.

With respect to the ADB's application, CUPE recalled the circumstances in which it was created and emphasized the promiscuous relationship between QPT and the ADB. CUPE relied on the provisions of section 25 of the Code, which prohibits certification of a union "dominated or influenced by an employer."

XI

CONCLUSION

The policy which must guide the application of the specific scheme for geographic certification governed by section 34 is not at issue here. As we noted earlier, this provision is designed to meet two requirements of the longshoring industry. The first concerns the precariousness of the employment situation of a longshoreman who works for a number of employers, who are, moreover, by definition competitors. The second concerns the need to provide these employers with a stable pool of qualified and reliable labour. Ultimately, by achieving these objectives we ensure greater industrial peace, which is a matter of public interest.

In this case, there is no doubt that the needs that existed in 1987 are still present in the region of the ports of Trois-Rivières and Bécancour. What has changed since then is the number of professional longshoremen. This number has decreased, which means that the average mobility of the group as a whole has increased. The figures set out above are eloquent evidence of this. A majority of the professional longshoremen in this region work on both shores, in unequal proportions, perhaps, but nonetheless undeniably.

All employers have, for their part, benefited over these years from the vocational training and accessibility of the longshoremen, as a result of a job security system implemented to provide them with a stable labour force. There is every indication that they will continue to draw from this common labour pool for the simple reason that it is to their advantage to do so. Nothing in the testimony given indicates that industrial peace may be better ensured by artificially dividing this homogeneous group of longshoremen and employers.

What about the application by the 13 Bécancour longshoremen? Their frustration, facing the apparent impossibility to all of this ever being resolved, is understandable. However, the fact that dispatching continued to be done separately between Bécancour and Trois-Rivières was solely because no one has ever succeeded in signing a single collective agreement in 10 years, except perhaps for one week in April 1992.

Without in any way blaming the Bécancour longshoremen for their insistence, we would, however, invite them to look beyond the end of their noses and not to trust to smoke and mirrors. Not too long ago, Bécancour was referred to as the "little port on the south shore." At that time, because

their earnings were inadequate, the Bécancour longshoremen understandably wanted to work on the other side of the river. They also wanted to put an end to the "flying squad" at QPT, which transported its longshoremen from Pointe-au-Pic to Bécancour. That was just yesterday.

Since then, the apparent job security QPT has brought them has cost them dearly in terms of labour relations. It might also be short-lived, if several longshoring businesses some day return to Bécancour. If the Board decided to create a separate unit for QPT in Bécancour, what would become of the me-too clause signed by QPT? What would happen if the park users chose a business other than QPT? What would prevent them from bringing in their own workers if there were no multi-employer certification in force?

What is being proposed, in the name of the interest of a few, is in fact chaos for everyone, not industrial peace. It is unfortunate to have to say it, but these comments by QPT do not ring true, and we shall leave it at that. In labour relations, industrial peace is achieved by entering into a collective agreement with the duly certified bargaining agent. The evidence shows that QPT has done everything it could to delay, oppose, impede and finally prohibit any collective agreement being signed in this region, for a full decade. QPT has used every means at its disposal, including its recent promiscuous relationship with the ADB, to prevent section 34 being applied to Bécancour and Trois-Rivières.

Yet we know that the MEA and the ILA were prepared to sign a collective agreement on August 19, 1988, when QPT obtained an injunction to prevent them from doing so. On August 11, scarcely a week earlier, the Federal Court of Appeal had dismissed QPT's application for a stay and thereby opened

the way for such a collective agreement to be signed. We know what happened next.

Moreover, the Board wishes to note that the Société, or some of its directors, misled the Board by concealing the fact that QPT's exclusive licence had not been renewed. As we saw earlier (page 14), however, the Société alleged in documents filed after its decision not to renew the licence that there was such a licence and that this fact was essential to this case. We regret having to say it, but this is unacceptable conduct which, moreover, neither the Société nor its counsel in any way attempted to excuse.

The port of Bécancour may have a specialized mandate, to the extent that it has a captive clientele. This, however, is not unique. The history of the longshoring industry shows that no longshoring business can live or prosper in isolation. The port of Bécancour is a huge port along the St. Lawrence river. Whether it is served exclusively by one longshoring business, or competitively by several, it is a major player in the economic life of this region. The Société cannot simply set up a device that allows it to ignore the economic reality of the longshoring industry, which requires that a single labour pool be shared among the employers in the same region. In this region, in the heart of Quebec, this pool in reality includes longshoremen on both shores.

This is in fact the reality which QPT, the ADB, the Société and the Comité have asked us to deny. With respect, we cannot share this opinion. The Board's interest is industrial peace, and it is very concerned about the situation. We have lost count of the decisions issued throughout the country in which unions were very firmly invited to look economic reality squarely in the face. The Board would be ill-advised, in addressing economic players

of such significance, not to invite them, with due respect but also with due firmness, to stop ignoring the economic realities of the labour market in the longshoring industry.

The Bécancour longshoremen who have formed the ADB were directly urged by QPT to apply for separate certification. The Board dismisses their application unequivocally. We could undoubtedly have done so based on this obvious influence by QPT over the ADB. We believe it more appropriate to dismiss it because it is devoid of any basis in terms of establishing sound labour relations. The unit sought by the ADB is not appropriate for collective bargaining.

The Bécancour and Trois-Rivières longshoremen must realize, like their employers, that they are part of the same group and that the geographic unit which we have defined for this region is here to stay. The evidence heard has demonstrated this convincingly. It is precisely because of this evidence that we stated our intention to write reasons for our decision to certify CUPE again.

XII

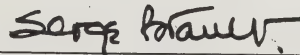
DECISION

Satisfied that a regional unit for Bécancour and Trois-Rivières is still the only appropriate bargaining unit in this case, the Board allowed CUPE's application for certification on June 12 and dismissed the ADB's application.

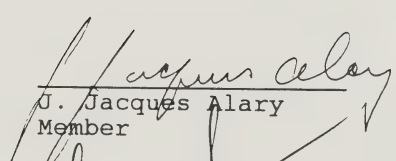
CUPE has therefore been the bargaining agent for a unit of employees covering "all employees involved in loading and unloading ships and other related duties for all employers in the longshoring industry in the geographic region

comprised of the ports of Bécancour and Trois-Rivières" since June 12, 1991. That ended the first stage in the CUPE certification proceedings, the stage in which the unit was determined and the majority union designated.

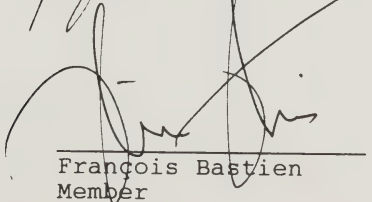
The second stage is the determination of an employer representative. The June 12 order directed the employers affected to choose collectively an employer representative and to inform the Board of its identity by June 25, 1992 at the latest, in accordance with section 34(3)(a) of the Code. They have not reached an agreement. The Board therefore, in accordance with the powers conferred by section 34(4), appointed an employer representative. The reasons for its decision on this issue are being issued today (Terminaux Portuaires du Québec Inc. et autres (968), supra).



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 30th day of October 1992.

